Supreme Court, U.S.
FILED
JUN 22 1993
OFFICE OF THE CLERK

No. 92-2054

IN THE
# Supreme Court Of The United States
OCTOBER TERM, 1992

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DAVID KELLEBREW,
*Petitioner,*

v.

FEATHERLITE PRECAST CORPORATION,
Respondent.

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**Petition For Writ Of Certiorari To The Supreme Court Of Texas**

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## PETITION FOR WRIT OF CERTIORARI

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109 pp

## QUESTIONS PRESENTED FOR REVIEW

I.

DO PARTIES TO CIVIL LITIGATION IN A STATE COURT HAVE A DUE PROCESS RIGHT TO A RETAINED COUNSEL OF THEIR CHOICE UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ABSENT COMPELLING REASONS TO DENY THAT CHOICE?

II.

DID THE TEXAS COURT ERR IN DISMISSING PETITIONER'S SUIT BECAUSE THE RETAINED COUNSEL OF HIS CHOICE WAS STILL IN TRIAL IN ANOTHER CASE ON THE DAY THE TRIAL IN THIS CASE-AT-BAR WAS SET TO COMMENCE--RESULTING IN PETITIONER HAVING TO REPRESENT HIMSELF OR HAVE HIS CASE DISMISSED?

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NO. _____

IN THE
# Supreme Court Of The United States
OCTOBER TERM, 1992

DAVID KELLEBREW
*Petitioner,*

v.

FEATHERLITE PRECAST CORPORATION
*Respondent.*

**Petition for Writ of Certiorari to the Supreme Court of Texas**

## PETITION FOR WRIT OF CERTIORARI

The Petitioner, DAVID KELLEBREW respectfully prays that a writ of certiorari issue to review the opinion of the Third Court of Appeals of Texas issued on October 21, 1992 and the refusal of the Supreme Court of Texas to review this case on March 24, 1993.

## OPINIONS BELOW

Kellebrew filed a Motion for Continuance on September 30, 1991. It was denied by Judge John K. Dietz on October 3, 1991. A second Motion for Continuance was filed on October 7, 1991. That Motion for Continuance was denied by Judge Joseph H. Hart on October 7, 1991. Judge Hart ordered the dismissal of this case on October 8, 1991, because of Kellebrew's failure to prosecute that case when called to trial on October 7, 1991. On October 22, 1991 Kellebrew filed his Motion to Reinstate this case on the court's trial docket. On November 13, 1991, Judge Hart denied Kellebrew's Motion to Reinstate the case on the court's trial docket. The Honorable Third Court of Appeals affirmed the trial court and denied petitioner's Motion for Rehearing by Written Opinion on October 21, 1992. The Supreme Court of Texas denied without a written opinion Kellebrew's application for a writ of error on February 17, 1993. On March 24, 1993, the Supreme Court of Texas overruled Kellebrew's Motion for a rehearing. Copies of the appropriate rulings are contained in Petitioner's appendix which accompanies this Petition for Writ of Certiorari.

## JURISDICTION

The Supreme Court of Texas entered its final order denying Petitioner's Motion for Rehearing of his Application for a Writ of Error on March 24, 1993.

This Court has jurisdiction to review that order pursuant to 28 U.S.C.A. § 1257.

## UNITED STATES CONSTITUTION

### FOURTEENTH AMENDMENT, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On October 7, 1991, the trial court denied Kellebrew's Motion for Continuance (Appendix Page 38). On October 8, 1991, the trial court dismissed Kellebrew's lawsuit on the grounds "...that he refused to proceed with his case." (Appendix Page 40). Plaintiff filed his Motion to Reinstate the case on the court's docket (Appendix Page 43). In the Motion to Reinstate the case, Kellebrew explained to the trial court that his attorney, Glen W. Morgan, was still in trial in a lawsuit in Orange County, Texas at the time of the dismissal of Kellebrew's case (Appendix Page 44). Kellebrew's case was on file in Austin, Travis County, Texas. The trial court denied the Kellebrew's Motion to Reinstate the case (Appendix Page 80). The arguments made at the Motion for a Continuance and the Motion to Reinstate the case are in the attached Appendix (Pages 1-37). Counsel for Kellebrew argued that the denial of his right to go to trial with his retained attorney under the facts of the case was a violation of his due process rights (Appendix Pages 22-23).

In Kellebrew's brief to the Third Court of Appeals, sitting in Austin, Texas, he stated:

> The District Judges of Travis County were insisting that Kellebrew go to trial without his attorney or face the dismissal of his lawsuit. The courts in Texas recognize that a party's right to his counsel at a trial is a valuable right and its unwarranted denial is reversible error. See, *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); and, *State v. Crank*, 666 S.W.2d 91, 94-95 (Tex. 1984). The Court in *Crank* stated the constitutional principles involved by quoting from a United States Supreme Court opinion:
>
> In *Ungar v. Sarafite*, 376 U.S. 575, 589. 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964), the United States Supreme Court held:
>
> > The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process *even if the party .. is compelled to defend without counsel*, *Avery v. Alabama*, 308 U.S. 444[60 S.Ct. 321, 84 L.Ed. 377 (1940)]. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.

> *Chandler v. Fretag*, 348 U.S. 3[75 S.Ct. 1, 99 L.Ed. 4(1954)]. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. [citations omitted] (emphasis added).

*See also, Morris v. Slappy*,____ U.S. ____, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983).

The district courts of Travis County refused to consider the clear predicament that Kellebrew and his attorneys were in. The district courts were insisting that Glen W. Morgan perform the act of bilocation (being in two places at the same time). No appellate court in Texas has ever required an attorney to perform the miraculous act of bilocation. The denial of a continuance by the district courts of Travis County was so arbitrary as to violate Kellebrew's due process rights to his attorney of choice. See, *5th, 6th, & 14th Amendments* to *the United States Constitution.*

Kellebrew made the identical argument in his Application for a Writ of Error to the Supreme Court of Texas.

## REASONS FOR GRANTING THE WRIT

"He that is his own lawyer has a fool for a client." Proverb

Kellebrew had a right to go to trial with the attorney of his choice. When the trial court found out that his attorney was in trial in another case in East Texas, it denied Kellebrew's Motion for Continuance and ordered him to go to trial that very day without his attorney. When he was unable to represent himself and proceed with the trial, it was dismissed by the district judge. The facts of this case constitute a denial of Kellebrew's right to due process under the Fourteenth Amendment to the United States Constitution. This principle has been most recently expressed in *Texas Catastrophe Ins. Ass'n. v. Morales*, 975 F.2d 1178, 1180-81 (5th Cir. 1992):

> Nowhere does the Constitution specifically say that a state cannot deprive persons of counsel in civil trials, but a number of cases address the question. *See, e.g. McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262-65 (5th Cir. 1983); *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 945-46 (5th Cir. Unit A Jan. 1981), *cert. denied*, 452 U.S. 906, 110 S.Ct. 3032, 69 L.Ed.2d 407 (1981); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980); *Accord Gray v. New England Tel & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986). This Court has construed Supreme Court precedent to find "a constitutional right to retain hired counsel." *Id.* at 1118 (construing *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932). But *see*

*Kentucky W. Va. Gas Co. v. Pennsylvania Public Utility Comm'n*, 837 F.2d 600, 618 (3d Cir.) ("The Supreme Court has not recognized a constitutional right to counsel in a civil case ..."), *cert. denied*, 488 U.S. 941, 109 S.Ct. 365, 102 L.Ed.2d 355 (1988). As the Supreme Court stated,

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

*Powell*, 287 U.S. at 69, 53 S.Ct. at 64. The *Powell* Court, which directly reviewed a state conviction, was speaking of the Fourteenth Amendment due process clause, with *Potashnick* applied the Fifth Amendment due process clause to a deprivation caused by a federal court. *Potashnick*, 609 F.2d at 1117. Because the deprivation in the instant case is caused by a state, the Fourteenth Amendment due process clause is the appropriate amendment on which to base this due process claim.

The right to counsel in civil matters "include the right to choose the lawyer who will provide that representation." *McCuin*, 714 F.2d at 1257. While this right is "one of

> constitutional dimensions and should be freely exercised without impingement," the right is not absolute. *McCuin*, 714 F.2d at 1262. If the state can show "compelling reasons," then a party's right to choose its own counsel may be overridden.

The trial court in this case and the appellate court have been unable to demonstrate "compelling reasons" why Kellebrew should have been denied the assistance of his retained counsel and required to go forward with the trial of his personal injury claim without legal assistance. Kellebrew asked the trial court for only a few days postponement of the trial until his trial counsel could finish the trial in East Texas and arrive in Austin. (Appendix Page 13). The actions of the trial court in Austin were arbitrary and capricious and denied Kellebrew his due process rights to the assistance of his retained counsel. Such due process rights exist for Kellebrew under the protection of the Fourteenth Amendment to the United States Constitution.

The District Court of Travis County denied Kellebrew his due process right to the attorney he had retained in another regard. The Court refused to apply it's own local rules. Since Kellebrew's attorney was in trial in another court, a continuance should have been granted. All of those attorneys and clients who live within the Third Administrative Judicial Region of Texas *know* that the District Courts of that region [Travis County] are governed by the "Rule of Administration" for that judicial region. Rule 7 deals with "conflicting engagements" and states:

> a) *If an attorney is actually in trial in one court such attorney may not be put to trial in another court.*

---

b) When an attorney is assigned to two courts for the same date:

1) It is the duty of the attorney to call the affected judges' attention to all dual settings as soon as they are known.

2) *When a dual setting problem is made known, the affected judge should confer and agree on which case has priority.*

3) *The following priorities are established to aid judges in determining which case has priority.*

A) Criminal case
B) Case given preference by statute
C) *Earliest set case*
D) Earliest filed case
E) Courts in multi-judge counties should yield to single judge counties and courts of multi-county districts.

c) In the event the affected judges cannot agree on which case has priority, the question shall be resolved by the regional presiding judge or judges. If two or more regions are affected and the regional presiding judges cannot agree, the question shall be resolved by the Chief Justice of the Supreme Court of Texas. (emphasis added)

Important public policy reasons of comity and due process are involved in this case. A review of the record demonstrates that the district court in Austin, Travis County, Texas, had no interest in the needs or concerns of the district court in Orange County, Texas, or the lawyers trying a

lawsuit there. The district judge in Orange County filed an affidavit with the district court in Travis County explaining the need for the attendance of Kellebrew's attorney in the trial taking place in Orange County. (Appendix Pages 67-70). The trial in Orange County was finished two days after the docket call in Travis County. (Appendix page 69). If a party to a civil lawsuit has a constitutional right to an attorney of his choice to help him present his claims of personal injury to a jury, that right cannot be taken from him in such an arbitrary and capricious manner. By depriving Kellebrew of his retained counsel, the trial court deprived him of the right to a fair trial.

## CONCLUSION

Because the decisions below are in conflict with the due process requirements of the Fourteenth Amendment to the United States Constitution, and federal appellate decisions interpreting that Amendment, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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**APPENDIX A**

No. 430,189

| | |
|---|---|
| DAVID KELLEBREW | ) IN THE DISTRICT |
| | ) COURT OF TRAVIS |
| VS. | ) COUNTY, TEXAS |
| | ) |
| FEATHERLITE PRECAST CORPORATION AND FEATHERLITE BUILDING PRODUCTS | ) 147TH JUDICIAL ) DISTRICT |

MOTION FOR CONTINUANCE

BEFORE THE HONORABLE JUDGE JOSEPH H HART

*APPEARANCES:*

*ATTORNEY FOR THE PLAINTIFF:*

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-and-

GUY C. FISHER
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Austin, Texas 78701

**ORIGINAL**
**March 24, 1993**

*ATTORNEY FOR THE DEFENDANT:*

CRAIG A. NEVELOW
Bankston, Wright & Greenhill
1800 MBank Tower
Austin, Texas 78768

**EXHIBIT E**

---

BE IT REMEMBERED that the above-entitled and numbered cause came on for hearing on the 7th day of October, 1991 in the 126th District Court of Travis County, Texas, before the Honorable Judge Joseph H. Hart, whereupon the following proceedings were had:

*October 7, 1991*

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**THE COURT:** This is 430, 189, Kellebrew vs. Featherlite Precast Corporation, and a Motion for Continuance -- a renewed Motion for Continuance has just been presented by counsel for Plaintiff and opposed by counsel for Defendant. The motion had previously been heard on Thursday, October the 3rd, correct, or was it Friday the --

**MR. NEVELOW:** It was Thursday.

**THE COURT:** -- Thursday, October the 3rd, and denied by Judge Dietz and a request for a Writ of Mandamus to the Court of Appeals was presented on Friday and denied.

I've heard the Motion for Continuance and deny that motion, and Defendant has announced ready for trial.

Now, Mr. Clarkson -- first of all, let me get you to announce your appearances for the record

**MR. CLARKSON:** My name is Richard J. Clarkson, and I'm here to represent David Kellebrew. I am an attorney with the firm of Reaud, R-e-a-u-d, Reaud, Morgan & Quinn of Beaumont, Texas.

**MR. FISHER:** I'm Guy Fisher. I was asked to appear as local counsel in this case, and we also have another matter of trying to find that original order and we may need to ask this Court for an order.

**MR. NEVELOW:** Your Honor, Craig Nevelow for the Defendant Featherlite Precast Corporation.

**THE COURT:** All right. The cause is now called for trial, and Mr. Clarkson, then are you ready to proceed to trial and are you -- what is your position at this point?

**MR. CLARKSON:** Your honor, the Plaintiff is not ready for trial. The Court has been listening to oral arguments about the Motion for Continuance for maybe 15 minutes or so and since this is a matter that may go up to the appellate court by mandamus, and/or appeal, I think that there should be stated in the record the offer of proof as to what the Court considered in deciding to deny a few moments ago the Motion for Continuance.

**THE COURT:** All right. You may do that. I would appreciate in the future if -- if there is something that you want reported, that you so state at the beginning so we do not have to repeat -- repeat it all.

You may proceed, Mr. Clarkson.

**MR. CLARKSON:** Okay. Thank you. The offer of proof that was given to the Court this morning on the Motion for Continuance was that Glen W. Morgan and also Alto V. Watson, III are trying a case in Orange County, Texas in the court of Judge David Dunn in the case of Debra Harris, et al. vs. Missouri Pacific Railway Company, et al. B-880,112-C.

That court -- that case began trial at 9 a.m. on September 30th, 1991 and is continuing in trial through the week at least of September -- of October 7th, 1991. Mr Morgan cannot be here to try this case, or any other attorney of the firm. Mr. Kellebrew has presented to the Court an affidavit which states that the attorney he hired was Glen Morgan, and he's the only one who can try his case.

Judge Pat Clark of the District Court of Orange County, Texas has signed an order on October 4th, 1991 denying Mr. Morgan a Motion for Continuance in the case of Harris vs. Missouri Pacific Railroad Company ordering him to remain in trial in Orange County until that case has been concluded. Both Judge Dunn and Judge Clark have offered to talk with any Judge here in Travis County about this if there's any question about my proffer of proof as to what is the state of affairs this morning in Orange County, Texas.

Likewise, on the question of an attempt on Friday evening between 4:30 and 5 p.m. to file and obtain mandamus relief in the Third Court of Appeals, that was done, although Rule 121 of the Texas Rules of Appellate Procedure requires a certified copy of the order that is being appealed. No copy could be found by the Clerk's office of any order

signed by Judge Dietz, Travis County District Judge, of an order he purportedly signed on October 3rd, 1991.

The Court, about 5 p.m., denied the application to file a petition for writ of mandamus. We have advised Judge Hart this morning of the hearing with Judge Dietz on October 3rd and through counsel for Plaintiff do not have a copy of that transcript of that hearing, Mr. Nevelow does, and I'm sure -- and in fact has invited Judge Hart to look at that transcript. But my personal recollection is that he denied the continuance on October 3rd because there was no showing that Mr. Morgan could not be present this morning to try this case. And the proof we offer through my representation to the Court is that he is unavailable.

Now, for the record, what I'd like to do is offer a copy of the petition for rehearing on the petition for writ of mandamus into the record in this case, which contains two affidavits by Glen Morgan, an affidavit by Richard Clarkson, a proposed order from Judge Dietz, an affidavit from David Kellebrew, the client, and a copy of the order from Judge Pat Clark of the 163rd District Court in Orange County, Texas, ordering Mr. Morgan to stay in Orange County and continue the trial of the Harris case.

(Instrument marked for identification
(as Plaintiff's Exhibit No. 1.

**MR. CLARKSON:** Your honor, we offer that copy of that document into evidence.

**THE COURT:** That's marked Plaintiff's Exhibit 1?

**MR. CLARKSON:** Yes, sir.

**THE COURT:** All right. For purposes of this hearing, Plaintiff's Exhibit 1 is received.

(Instrument received into evidence
(as Plaintiff's Exhibit No. 1.

**THE COURT:** Okay. Mr. Nevelow, do you want to respond, please, sir?

**MR. NEVELOW:** Your Honor, I'd like to reiterate what was stated in the earlier hearing. I'll have the court reporter mark two documents.

(Instruments marked for identification
(as Defendant's Exhibit Nos. 1 and 2.

**THE COURT:** All right. You need to identify those for the record, please, sir.

**MR. NEVELOW:** Your Honor, marked as Defendant's Exhibit No. 1 is a transcript, true and correct copy of the transcript of the Motion for Continuance hearing in front of Judge Dietz on October 3rd and Betty Haygood, his court reporter for the 250th Judicial District Court, certifies it is a true and correct copy. I'm not providing the original to the Court because we intend to bring that up to the Court of Appeals, Your Honor.

I'm also providing and letting Plaintiff's counsel review that. I also have an affidavit. Again, we have a copy, Your Honor. It's an affidavit from Judge John Dietz about what truly happened after the hearing when Plaintiff's counsel made an ex parte telephone call to him while I was in his office in Beaumont but he didn't tell me anything about it and it indicates what he had done to try to speak with the Judges in Orange County. It again is a copy

because the original of the affidavit is going to the Court of Appeals, Your Honor.

About regard to --

**THE COURT:** Do you offer those?

**MR. NEVELOW:** I do, Your Honor.

**THE COURT:** All right. Defendant's 1 and 2 are offered. Any objection for purposes of this hearing?

**MR. CLARKSON:** No, Your Honor.

**MR. FISHER:** No, Your Honor.

**THE COURT:** They are received.

(Instruments received into evidence
(as Defendant's Exhibit Nos. 1 and 2.

**MR. NEVELOW:** Your Honor, this case is a personal injury case from a 1985 construction site accident. The case was filed in 1987. And Your Honor, at this time--

**THE COURT:** The case was filed when?

**MR. NEVELOW:** In 1987. If you'll give me one second, I'll look at the docket sheet and get the exact, Your Honor. But I would like to ask the Court to take judicial notice, if it would, of the docket sheet, which would be the complete docket sheet on this case. I only have one through the last Motion for Continuance that was heard before the March trial setting.

**THE COURT:** All right. I will take notice of the docket sheet and the record in this case. The docket sheet does note that the file -- the case was filed on October 28th, 1987. When y'all are through with those, I'd like to--

**MR. NEVELOW:** Your Honor, the first trial date in this matter was June 11, 1990. Defense counsel set that case for trial back in May of 1989, more than a year before the setting. However, Plaintiff's counsel, Mr. Morgan, did not notify defense counsel of a conflict until 26 days before trial with a motion that -- he has a certificate of service dated May 16, 1990. No mention that I know of to the Courts of Travis County about this conflict. Since it was the first one, we agreed to the continuance.

However, we immediately wrote Plaintiff's counsel, Mr. Glen Morgan, on May 24, 1990, requesting trial setting in January so we could get an agreement on this one. I was written back that March of '91 would be fine, so we set the trial date for March 4, 1991. This trial notice went out on June 18, nine months before the agreed trial setting.

However, Your Honor, a note -- another Motion for Continuance was filed -- February 22, '91 is the certificate of service. I received it approximately 10 days before trial. It was also based on a conflicting setting that I never received any notice of and neither did the Travis County Courts and the Motion for Continuance was denied by Judge David.

We went to trial and it was mistried by Judge Dibrell before opening statement. On the same day it was mistried on March 5, I sent another request for resetting to Plaintiff's counsel, asking if the October trial setting would be fine. I gave him a time limit of something about a week in which to respond and tell me whether it was okay or not.

I did receive a response on March 13 by telefax indicating he had no problem with either the October 7 or October 21 settings that I had suggested. Quote, "subject to other trial settings." end quote. I set it at that time seven months ago for this October 7 trial setting and I responded to him with a letter. All of these correspondence are contained in the transcript which I've attached here as Defendant's Exhibit 1.

Are they in there, Your Honor?

**THE COURT:** No, sir.

**MR. NEVELOW:** If it is okay with the Court, Your Honor, since I want to keep the original intact, can I attach to Exhibit 1 the original of those exhibits that were made with the transcript, and we can make a copy of them for this particular transcript?

**THE COURT:** If you wish to mark anything else that you want to put in as the next Defendant's exhibit, that might be better. Then you can substitute copies for the originals. If you will just make sure to identify them for the record, all of the documents that are contained within the next Defendant's exhibit.

**MR. NEVELOW:** Okay.

**THE COURT:** Those documents will be marked collectively as Defendant's Exhibit 3. I would like for you to identify for the record what documents are contained within the -- within Defendant's Exhibit 3, if you would, please, sir.

**MR. NEVELOW:** Thank you, Your Honor. Defendant's Exhibit 3 was Defendant's Exhibit No. 1 from

the earlier Motion for Continuance. Included is a notice of jury trial dated May 32, 1989 and a copy of a green card. The -- it is followed by the Plaintiff's Motion for Continuance dated May 14, 1990, with an attached affidavit and an affidavit order.

It is followed by an order from Judge Hart, an agreed order on a Motion for Continuance on a Summary Judgment January 31 of 1989. I'm sorry, that's not an agreed order, it's just approved by both counsel at the hearing.

There's a letter of May 24, 1990 to Alto Watson, who has been handling this case for Mr. Morgan for a long time now, with regard to a January trial setting; a response from Mr. Watson on May 31, 1990 asking for a March trial setting; a June 18 letter from me to Mr. Watson notifying him of the March 4 trial setting; and a copy of a green card; the next Motion for Continuance from Glen Morgan dated February 20, 1990 with attachments and a proposed order; the order denying the Motion for Continuance signed by Paul Davis on March 1, 1991; a March 14, '91 letter from myself with regard to this trial setting, and that was sent to Mr. Morgan with a copy of a green card; a March 13 letter to Mr. Morgan setting this case for October 7, with green card attached; the FAX we had talked about from Mr. Morgan advising me that October 21 or October 7 would be fine subject to other trial setting as stated March 13; a March 5 letter from me to Mr. Morgan setting the case -- I'm sorry, this is the one by either October 7 or October 21 with a copy of the green card.

And that is what's being marked as Defendant's Exhibit 3 in this proceeding. The original of which is going to the appellate court with our responsive motion. Your Honor.

**THE COURT:** All right. Is there any objection to receiving Defendant's Exhibit 3 for purposes of this hearing?

**MR. CLARKSON:** I'm in disadvantage, Your Honor, in that my knowledge of this case only goes from about October the 3rd and the 4th and Mr. Nevelow's discussion of these documents and his characterization of them and his other narrative remarks, I'm not in a position to be able to acknowledge the truth of those. Again, the client cannot be properly represented in this Court this morning because his attorney since 1987 is not able to be here.

**THE COURT:** Defendant's 3 is received for purposes of this hearing.

(Instrument received into evidence as
(Defendant's Exhibit No. 3.

**MR. NEVELOW:** May I continue, Your Honor?

**THE COURT:** You may.

**MR. NEVELOW:** I believe I left off with Mr. Morgan's response to me telling me that everything was okay. I wrote him right back, telling him if -- essentially -- and the document is in there, if -- if you have a problem with the trial setting, tell me now and let me know and I'm sure you would tell me now if you had one and I'm going to represent to the Court if you file another Motion for Continuance that you were given this opportunity and did not say anything.

Your Honor, I represent to the Court that Mr. Morgan again did not notify either the Court or me of a trial

setting in Orange, that they knew would last at least two weeks, until seven days before this trial setting when they filed another Motion for Continuance.

That's the one that Judge Dietz heard and overruled. I think you'll see from the transcript his reasons for doing so. They are represented in there. And then when the matter was brought before the Court of Appeals, Plaintiff's counsel sent as an exhibit to that motion the filed marked copy of Judge Dietz' order denying the Motion for Continuance.

Your Honor, I'd like to just cite two cases to the Court with regard to absence of counsel. First of all, there's been no mention in either of these motions for continuance of when the Orange County case was set, why Mr. Morgan didn't notify anybody about it. There was no mention of whether any of the seven attorneys for this prominent Beaumont firm of Reaud, Morgan & Quinn -- whether all of them were in trial or any of them could try this, and there was a discussion of Mr. Alto Watson, who is, I think, second on this trial in Orange County.

But the cases of Lumbermens Mutual Casualty Company vs. Watson, 618 Southwest 2nd 883, and Rabe vs. Guaranty National Insurance Company, 787 Southwest 2nd 575, support the position that -- that they require a party to show that absence of counsel at trial was not due to the parties' own fault or negligence as in this case and that they must show that there's no one available to try the case, and that hasn't been shown in this case. And Your Honor, that's my offer of proof.

**THE COURT:** All right. Anything further then that has not been said?

**MR. CLARKSON:** I don't know if it's been said in the record at this time, but the case, when it was tried in March, the mistrial was caused by the acts of Mr. Nevelow and not by anything the Plaintiff or his attorneys have done.

If Mr. Morgan were not in trial, he would be here and did not know that the case would go on this long. I understand the Court has indicated it will overrule a written order of the Motion for a Continuance. I do have a point of inquiry and that is how long the Court will sit -- is this for a two-week period that the Court will hear cases set at this time?

**THE COURT:** This case is called for -- right now for trial and if this case cannot be reached for trial -- if this case does not go to trial, I will take another -- another case. If we finish this case promptly, within the day, then I will call another case for jury trial.

**MR. CLARKSON:** Is there any possibility, if the case in Orange does reach a conclusion through settlement or otherwise this week, that it could try the Kellebrew case at the end of this week or early next week?

**THE COURT:** Counsel, this case has been called for -- for this time now and we will proceed to trial with this case. Your Motion for Continuance is denied.

**MR. NEVELOW:** I'd like to put two other small things on the record on the Motion for Continuance, and that is that Mr. Clarkson was not there at the trial March 5 and doesn't know the reasons for the mistrial, and two, that he did not indicate at any time before this that Mr. Morgan did not know that the case would go on this long and there's no indications that it would settl and in fact, he represented in the last hearing, which is in the transcript, Mr. Morgan

would be in trial all this week and probably into next week, making the two to three week trial. Thank you, Your Honor.

**THE COURT:** All right. The Motion for Continuance is denied.

Now, you had made another statement, Mr. Clarkson, off the record as to whether or not once the Motion for Continuance was denied, your position and the Plaintiff's position as far as going to trial.

**MR. CLARKSON:** Yes, Your Honor. The Court has indicated that it will call a jury to be selected in this case sometime after lunch and neither Mr. Morgan or Mr. Kellebrew can be in Austin at that time for trial, and so I'm advising the Court that we will not be here at that time.

**MR. NEVELOW:** Your Honor, Defendant is ready to go to trial and since two attorneys are here for the Plaintiff but say they're not ready for trial, we'd ask for a default and the rendering of take nothing judgment in this case, and Your Honor, we'd ask that the Court dismiss the Plaintiff's case with prejudice.

**THE COURT:** Based on the representation of Mr. Clarkson, the motion is granted and a default is ordered and it is ordered that Plaintiff take nothing with prejudice.

**MR. CLARKSON:** Your Honor, because of our need to take the Court's ruling to the Court of Appeals today, can he we have a written order denying the Motion for Continuance, one that can be certified? I know Judge Dietz' order was misplaced and we would be here to accompany your order to the Clerk's office if necessary.

**THE COURT:** Mr. Nevelow, would you prepare a draft of the order denying the Motion for Continuance, have that approved as to form by Mr. Clarkson or by Mr. Fisher and get that to me and I will sign it.

**MR. NEVELOW:** I will, Your Honor.

**THE COURT:** Thank you.

**MR. FISHER:** Thank you very much for your time this morning, Judge.

**THE COURT:** Thank you.

**MR. FISHER:** I appreciate it.

**THE COURT:** Okay. Ya'll are excused.

(End of proceedings.

## REPORTER'S CERTIFICATE

THE STATE OF TEXAS )
COUNTY OF TRAVIS )

I, Cynthia B. Alvarez, Official Court Reporter for the 126th Judicial District Court of Travis County, Texas, do hereby certify the preceding 18 pages contain a full, true and correct transcription of the proceedings in the above-styled and numbered cause, all of which occurred in open court and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that costs for the preparation of the said proceedings, including binding and indexing, are in the reasonable sum of $ 71.25.

WITNESS MY HAND this, the 8th day of October, 1991.

/s/ Cynthia B. Alvarez,
Cynthia B. Alvarez, CSR, RPR, CM
Official Court Reporter
P.O. Box 1748
Austin, Texas 78767
(512) 473-9322
Certification N. 462
Date of Expiration of Current
Certification: 12/31/92

## APPENDIX B

NO. 430.189

| | | |
|---|---|---|
| KELLEBREW | * | IN THE 147TH JUDICIAL |
| | * | |
| VS. | * | DISTRICT COURT OF |
| | * | |
| FEATHERLITE | * | TRAVIS COUNTY, |
| PRECAST CORP. | * | TEXAS |

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MOTION FOR REINSTATEMENT

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BEFORE HONORABLE JOSEPH HART,

JUDGE PRESIDING

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

*APPEARING FOR THE MOVANT*:

READUD, MORGAN & QUINN
BY: MR. GLEN MORGAN AND MR. RICHARD CLARKSON
801 Laurel Street
Beaumont, Texas 77701

*APPEARING FOR THE RESPONDENT*:

MR. CRAIG A. NEVELOW
Attorney at Law
1800 Bank One Tower
Austin, Texas 78701

BE IT REMEMBERED that on the 13th day of November 1991 the above-entitled and numbered cause came on for trial in the 126th Judicial District Court of Travis County, Texas, before The Honorable Joseph Hart, Judge of said Court, whereupon the following proceedings were had, to-wit:

*PROCEEDINGS*

*NOVEMBER 13, 1991*

**THE COURT:** Good morning. I call No. 430.189, Kellebrew versus Featherlite Building Products. And Counsel, would you announce your appearances.

**MR. MORGAN:** Your Honor, my name is Glen Morgan. I'm here on behalf of Mr. Kellebrew and we are ready. And I have with me Mr. Richard Clarkson and Mr. Guy Fisher.

**MR. NEVELOW:** Your Honor, Craig Nevelow on behalf of Featherlite Precast Corporation.

**THE COURT:** And Mr. Morgan, this is your motion?

**MR. MORGAN:** Yes, sir.

**THE COURT:** You may proceed.

**MR. MORGAN:** Thank you.

Judge, as you know, we are here to try and get a case reinstated that was dismissed for want of prosecution. I think that the basis for our motion would be Rule 165(a) that talks about reinstatement of the motion. And the rules say

that the Court shall, as opposed to the permissive may, "Reinstate the case upon a finding after a hearing that the failure of the party or his attorney was intentional or a result of conscious indifference but was instead due to accident or mistake or that the failure that may have occurred was otherwise reasonable explained."

And I want to go back. There are some things that we have now that we did not have at the time the motions for continuance were filed. As the Court may recall, this case was set for trial October 7th, not as the number one case or not as a specially set case. I think we were actually the 8th or 9th case on the docket, but it was set for that period to go to trial.

There was a case also that I was the attorney of record in styled Harris versus Mopac down in Orange County, Texas. It showed up on a docket as the No. 2 case, was later flipped to the No. 1 case and showed up on a try or dismiss docket.

Judge Dunn's affidavit that you now have-- and this is what you did not have at the time -- states that there was a docket call on September 20th, 1991. The Harris case was No. 2 at that time and subsequent to that, it became the No. 1 case and was set for trial September 30th.

Judge Dunn says, who was the district court judge there, says that, "This court would not have granted the Plaintiff a continuance because her attorney, Glen Morgan, was set on the jury docket of the Travis County District Courts for the week of October 7, 1991 as the 8th or 9th case. It is the practice here that a case on the try or dismiss docket will not be granted a continuance." It then says it had to go to trial on that date.

Later in there, Judge Dunn explains what happened while I was in trial. He was told by Judge Clark -- there was some confusion. We had a model that was too large for Judge Dunn's courtroom, so we were using a different court. Judge Dietz had been told that I was in Judge Clark's court. Well, that was true; it just wasn't Judge Clark trying the case. So he talked to Judge Clark and received confirmation that I was, in fact, in trial and he asked Judge Clark to tell Judge Dunn of his call.

So Judge Dunn was informed by Judge Clark and myself that Judge Dietz had called and Judge Dunn hearing the statement or affidavit says that he had called Judge Dietz's office in Austin and attempted to speak with him but he was unavailable. Judge Dunn then gave Judge Dietz's secretary his name and number and requested that Judge Dietz call so that they might discuss the conflict in trial schedules. He wanted to explain to Judge Dietz that he would not have granted me a continuance at the docket call on September 20th, but Judge Dietz did not return the phone call.

So we didn't -- at least this Court did not have, nor Judge Dietz at the time have, the benefit of the district court's thoughts on the situation at the time the motions were filed.

I think it goes almost without saying that cases can settle. I had this same situation in this same case present itself back in March of 1991. I was especially set No. 1 in Jefferson County and also this case enjoyed a No. 1 setting for this week in March. Both courts were saying, you'll be here at the same time.

I filed a continuance here in Travis County and it got denied. On a Friday at 6:00, the defendants in my case filed

a mandamus action with our court of appeals and that court granted a stay of my action in Jefferson County. So I switched gears and was able to come up here and start trial in the Kellebrew case in March of 1991.

So in this case, in October when we had the two settings, rather than try to file a continuance, I was hopeful of several things: Number one, that the Harris case might settle; number two, the Kellebrew case might settle; number three, the Harris case might be over in time to try the case.

And there were several reasons that we waited and filed the motion when we did -- the motion for continuance.

I learned from Judge Dunn in Orange County that the case of Harris versus Mopac would not be able to go on Friday of that week, September 30th. The end of that week, Judge Dunn had a judicial commitment out of the county. And so, we were not going to be able to go to trial. I knew then that the case would carry over and prevent me from being here in Travis County.

We filed our motion for continuance as a result of me actually being in trial. And there is no showing by the defendant, and not that they have a burden to, but there is no agreement even that had I filed it earlier, that there would have somehow been an agreement to go ahead and continue the case. So there is no reason to believe that the time of filing of the motion has anything to do with the defendant's point of view in this.

The most recent case I can find, I think, that really has an impact on this is the case of Dancey versus Daggett. That was that case involving a temporary orders arising out of a domestic relations court. There, the attorney for one of the parties was in a federal court hearing. It was scheduled

for one day. It got put off to the following day from April 16th to April 17th. The federal court hearing continued over to the 17th. The family judge went ahead and had his hearing and entered temporary orders.

The Supreme Court found there that there was a conflict dispute set up in their local rules. They found that the judge's actions actually violated the local rules. But more than that, it says that there was a violation of due process, right to representation by counsel and a right to trial by jury. And I think that we have that situation here.

First, if you look at that case, what you find is that the attorney was not in trial. He was just in a hearing in the Dancey case. He did not file a motion for continuance in that hearing or at any time ask the federal judge to continue the hearing until he could get back from this temporary orders hearing. He at no time asked -- or there is no showing at least in that case -- that he asked the court not to convene that following day until he could go and resolve this matter that was set in the domestic relations court.

So, while we don't have a set of conflict disputes or setting disputes with local rules here in Travis County, I think what we have is, I've gone above and beyond what the Supreme Court says in the Dancey case in trying to stop the trial in progress. I actually went and filed a motion for continuance. Once Judge Dietz overruled my motion for continuance in Travis County. I went to Judge Dunn and filed a motion for continuance there to suspend the trial of that case, let me come up here and try this one and then go back and complete it. And that was overruled, as you might expect.

So I think that in this case, Mr. Kellebrew is deprived at this point of the right of representation, trial by jury and

due process. And I apologize for not knowing the name of this case, but it's the most recent Supreme Court case. It's come out in the last week that deals with the imposition of the death sentence.

Now, that involves a sanctions hearing where their pleadings were struck, the judgment entered and I think the verdict was for $30 million. And there the Supreme Court said, you should not impose the death sentence only under the most extreme circumstances and that's after you've reviewed other sanctions that might be possible, et cetera.

While this is not a pretrial sanctions situation, the thought again carries through to this case in that to actually dismiss this case because I was in trial somewhere else seems to be an imposition of the harshest of sanctions.

The thing that I thing we lose sight of a lot of times is that Mr. Kellebrew is a real person. He received a real injury. He received real surgery and has a real disability that affects not only him but his family. This is a case that everything has been done. This is a case that if it were set for trial Monday we would be here and could try this case.

The last deposition was taken, I think, two or three days before October 7th. I think it was taken on that Friday, if I'm not mistaken. The Friday that we didn't have trial, Mr. Nevelow came to Beaumont and deposed an economist in this case and it is actually ready to go.

Along the way, Mr. Nevelow has brought up the history of the case. And while I don;'t think that it's that important, I think the cases say that once you sort of get past things and continuances are granted, then you look at the merits of each particular one and not go back.

But I want to say that our firm was involved in a class action asbestos litigation case in federal court down in the Eastern District of Texas and it involved 2,600 people. It began in January of 1990 and it went through October of 1990. And the actual protective order wasn't lifted until January of 1991.

And we literally were trying groups of 15 and 20 cases at a time, complete cases, from opening statement all the way through receiving a verdict with the same jury and just bring in different groups of people, one after another.

There were three phases of that trial and a couple of the motions for continuance in this case were brought about by a setting that came up during that time when we had the federal protective order and we had to avail ourselves to that because we were actually in the middle of that.

Lastly, we were, in March, here in Travis County in Judge Dibrell's Court ready to go to trial, announced ready, proceeded with voir dire. And it was at that time as a result of Mr. Nevelow's actions during voir dire, Judge Dibrell felt that a mistrial was in order and he granted a mistrial.

And while I'm not real familiar with the docket settings here in Travis County, it's my understanding that we were not able to get a jury, another jury to come up and restart the trial and so it had to be put back off until some other time.

So I just really want the Court to know that this is not any type of conscious indifference or intentional thumbing of the nose at Travis County. This is something that -- Mr. Kellebrew wants his case tried. I want to try it. The only person in my firm that has done any work on this case, aside from myself, is Mr. Alto Watson. He happens to be the

attorney that was with me in trial. The docket sheet attached to the motion has the attorneys listed that were in trial. And it has both myself and Mr. Watson and he was there through the whole time and put on witnesses.

So, if the requirement is whether or not there is conscious indifference or just intentionally not doing something, well, then that's not met or not shown. And if the requirement is that I show the Court some reasonable explanation for this case not proceeding, then I think I met that. And in light of that, if the rule then says that it shall be reinstated, we would then, of course, as that it be reinstated.

I think that for purposes of the record, I've got to testify sort of to the facts that I just said. So rather than go through it, I would ask if it's okay to just have it show as my testimony what my argument in the case is. I'll allow Mr. Nevelow any cross-examination he might wish, as opposed to formally going back through it and all. Just whatever the Court might think about that.

**MR. NEVELOW:** As to the factual statements, I don't have a problem with making those part of the record as if they were testimony.

I'll reserve any rights, if it's okay with the Court, to ask questions to Mr. Morgan on the stand if necessary.

**THE COURT:** Okay.

**MR. MORGAN:** Judge, Mr. Fisher just reminded me of something else. We did attempt, as you know, to file a mandamus action at the local court of appeals and it was overruled and then we applied to the Supreme Court and it

was overruled. And, of course, we don't know why because they just denied the motion for leave.

And it could be that they just feel like at this point a direct appeal is the remedy; that there is nothing else to do. It's not like we are going to have to wait until a trial is over sometime away from now and then appeal it. The direct appeal might be the best route.

And we feel like that in light of the circumstances, in light of the facts, that it would be an abuse of discretion not to reinstate this case and in the interest of justice and with the facts being as they are, it should be reinstated. We would request that it be reinstated.

**THE COURT:** Thank you. Mr. Nevelow?

**MR. NEVELOW:** Your Honor, it is the Respondent's position in this case that the only thing the Court needs to look at in determining this motion to reconsider is the fact that the Plaintiff had two attorneys present in the courtroom when this case was called to trial on Monday morning. They were unwilling to go forward and there was no reason given why the Plaintiff could not also be available in Travis County to try the case at that time. Therefore, the Court does not even need to look back at the reasons why two Travis County judges denied motions for continuance filed by the Plaintiff, one as late as the day that it was called to trial.

However, since, there has been a number of argument made by counsel with regard to the motion for continuance, to a limited extent, I'd like to go through their motion and show the Court that the case law they present to the Court is not applicable to this case and their arguments unfounded.

First of all, I disagree with Mr. Morgan that there is anything new brought before the Court. I think the facts are the same as they were back when the original motion for continuance was argued when this case was brought to trial. And the reasons for dismissing the case today are still as valid as they were at that time. In fact, as counsel had stated, a mandamus was denied on two different levels. We don't know the reason why, but it was on the same basis they are giving the Court today.

Looking at Rule 165(a)(3), we are looking at a standard of conscious indifference and that's what's been shown by the Plaintiff. First of all, you have two attorneys and the Plaintiff knowing of a setting but unwilling to go forward. There is conscious indifference right there.

If not that, you have the fact that Morgan, the attorney of record, had a knowledge of the fact that he had two trial settings at the same time in two different courts and did not notify any of the affected parties; the attorneys, the courts until 7 days before trial of this conflict.

Mr. Morgan tries to make it an issue of when he would have properly filed his motion for continuance and whether that was timely or not. I submit to the Court the question is more a question of the timeliness of notification to the Court of this conflict so something could have been done about it. That was never done, no excuse has ever been given for that.

In fact, Mr. Morgan agreed to that setting in the Harris case in Orange County, knowing that this case had already been set in Travis County on October 7th. With that agreement of counsel, they set it on that date and that is also conscious indifference without notifying anybody.

In the motion counsel -- and they've alluded to it a bit here -- counsel has tried to limit what this Court can consider by way of his inactions and repeated refusal to notify counsel of conflicting settings. Under the guise of the case of Wyatt versus Texas Oklahoma Express, which is a Dallas 1985 no writ case, Your Honor, a copy of which I would like to give the Court at this time. However, that case does not support the position they are making in this case. What they did not tell the Court in their motion is that on Page 733 in the second column, the Court explicitly limits its holding in that case to the facts of that case.

And if you will look on Page 733, second column, the end of that first long paragraph, the last sentence is, "We limit our holding to the facts of this case because of inequities that could result and other sanctions are available." They also don't say that the facts of that case are extremely different from the facts of this case.

In the Wyatt case, plaintiff's counsel and the plaintiff were there and went to trial on the first day. And you will see that at the very top of the first column on Page 733. The Court went to trial the next day at 9 a.m, plaintiff's counsel was not there, but the plaintiff was there. Plaintiff's counsel said later that he was delayed by heavy traffic from Dallas to Fort Worth. With the plaintiff there and ready to go forward with her case, the court dismissed the case. And what the Wyatt court said in that situation, and only in that limited situation, the court had available to it sanctions and should not have dismissed the case when the plaintiff was ready to go forward.

In this case, the plaintiff was not ready to go forward and Mr. Clarkson said that the plaintiff was not in town and was not going to be coming in town and gave no reason why he could not do so. Therefore, the Court should stick with

the general rule which is stated in the Wyatt case, which is that the trial court is entitled to consider the entire history of the case, which is very important in this one and should be applied.

Even if I'm wrong in the way I read Wyatt, and I don't see any way I am, the facts on this continuance alone are enough to support two denials of a motion for continuance and then the dismissal when they were not going forward. I am talking about the motion for continuance, Your Honor, but please accept that that's just an alternative argument.

I think the motion for continuance is not a question anymore. It's already been denied twice. We are only looking at the fact that we had the attorneys available and the Plaintiff available and they would not go forward.

The next thing they do in their motion is talk about abandonment in saying that they did not abandon their case. And they use a case called Craig versus State, which is a 1968 Tyler Court of Appeals opinion. The reason why that citation is inappropriate is that abandonment is not the way they look at things anymore with regard to a dismissal for want of prosecution. We now have a statute which they've even cited, 165(a), which talks about intentional or conscious indifference.

When look at the Craig case, which I also have for the Court, it's clear that they did not have such a rule at that time. Because on Page 716, Headnotes 1 to 3, they day that even without statutory authority, a court has a right to dismiss a suit for failure to prosecute. And it appears from the first line that the rule governing that decision was supported by case authority. So back then, we had case law saying abandonment was the rule. We now have a statute

saying we are looking at conscious indifference or whether they intentionally acted. So that is not appropriate.

The Dancey case, which they have brought up again, is just as distinguishable today as it was when they brought it up in their two motions for continuance. Just to remind the Court quickly, in that case when counsel knew of the conflicting settings between the federal and state court hearing, he immediately notified the courts and had a change made in the state court to the next day. Unfortunately for him, the federal court changed it to the next day also and wouldn't change again. He was in a position not of his own making, unlike in this case.

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And therefore, they said it was a violation -- it was abuse of discretion because the court violated its local rules. Again, there's not even any statement by the Plaintiff's counsel that the Court has in any way violated the local rules of Travis County in its actions in this case.

Although, again, we are not looking at the continuance, the argument of no absence of counsel either on the continuance or on the dismissal is inappropriate. We gave the Court citations, too, and I believe case law at the time from the Lumberman's case where the courts of Texas have said that even though this newly licensed attorney who had never tried a worker's compensation case before may not have been capable to try it, he was with the man's firm and therefore they should have gone forward even though the attorney of record, just like Mr. Morgan, was not available because he was in another trial. The same situation.

In this case, we've had no affidavits that the seven members of this prominent Beaumont firm were unavailable to try the case. In fact, one of them was here; Mr. Clarkson, at the time, with local counsel.

Secondly, we have the Raid (phonetic) case, which said that when a firm fails to show, you must have a showing that another attorney from the firm could not have represented the plaintiff. And they require the parties to show that absence of counsel at trial was not due to the party's own fault or negligence. That has not been shown in this case.

Again, two attorneys present, no showing that these other members of the firm could not be prepared for the case. In fact, Your Honor, as counsel has told this Court, the case was already prepared for trial. Virtually every witness in the case was going to be by deposition. They are all out of town. We've got three doctors and some other people that have been deposed and it's all by deposition. Nothing to show that this couldn't have been tried by somebody else.

Another position now taken here in the courtroom, which was not made the basis of the motion, is that the continuance was filed late because of the possibility of settlement in one of the cases and no knowledge that their other case, the Harris case, would be tried over more than one week. And when the Court was going to be gone Friday, they knew it would be more than that.

Well, Mr. Clarkson told both this Court and Judge Dietz that that would be a two to three week trial, so I don't think there is any surprise there. And in my case, there has been no doubt there isn't going to be a settlement for a long period of time, because the parties are far apart.

And the reference to the death sentence is inappropriate in this case because the Court understands that in discovery, the Supreme Court allowed the harsher sanctions and now they are coming back from that and that's in the discovery area.

So, Your Honor, the problems of counsel are of his own making and they should have been able to go forward when they were here at that time.

**THE COURT:** Anything further?

**MR. MORGAN:** Just a couple words in response, Your Honor.

Mr. Nevelow says that there were two attorneys present. I'd like the Court to note just by looking at the docket sheet that Mr. Fisher is not an attorney of record. He is someone we had not even hired, but asked to show us around the courthouse and get us to where we needed to be and handle the directions of getting us in docket call, because we are not familiar with the system.

Mr. Clarkson has not done any work or shown up in this case at all throughout the entire file. So while there were two attorneys present, they were hardly the attorneys of record or anyone there that would be able to try the case.

Mr. Nevelow says there is no showing that this case could not be tried by anyone else and I take exception to that. There is an affidavit attached to our motion in there from Mr. Kellebrew himself that said, because of the facts of this case and the circumstances, that he wanted Glen Morgan, his attorney of record, to try the case and no other attorney.

So there is some evidence before the Court that says that there was no one else available to be able to try this case but myself. So the fact that this case was already prepared and that everything was done should not be held against the Plaintiff for wanting his attorney present. This case, Judge, has had so many things in it, from misnomers and summary

judgments -- two years ago we were up here having hearings on summary judgments and trying to get past that hurdle, all involving me. I made several trips up here for that purpose.

This is not a case that we have not chosen to prosecute. We have always insisted that we are ready to go to trial.

Mr. Nevelow, lastly, mentioned there was something about settlement. I can tell you we were talking settlement. The adjuster and I were having direct conversations until there was some knowledge on their part that I would not be able to be here. The impending result is obvious; settlement negotiations went no further.

It sounds to me like he is complaining of the timeliness of the motion saying that, well, the counsel knew this and he didn't file anything and he should have informed the other parties or the Court of the conflicts. And again, it goes back to the timeliness.

And we are here to look and see if there is some reasonable explanation for why this case got dismissed for want of prosecution. I say that, would it have made a difference to file the motion two weeks earlier? I was actually in trial. I don't know what this Court's procedure would be, but I can sort of surmise if I were in trial in front of Your Honor and midway or if the case lasted more than a week and the following week I had a setting and I asked you to continue your case until I go finish it, I can pretty much guess the results. Most courts like to start and finish. This was a try or dismiss case.

The thing that we didn't have before the motion for continuance is, the fact that now we have testimony from a district judge that says, I would not have granted a continu-

ance had he filed it in Orange County. We didn't know that at the time of the motion for continuance hearings, and we know that now.

I think that the theories as set out and the cases that we cited have bearing on this case. This is a situation where there were a lot of other things that could have happened if Mr. Nevelow says, Judge, as a result of his not letting us know until a week before trial, you know, I put my experts on notice. My client has done this and I have spent this much money in trying to get ready and we'd ask for our cost involved -- and that may be something that would be more in line with what we are looking at here. The timeliness; you didn't let us know in time. We've incurred this cost. Pay us for that as a sanction for your late notice of your conflict. But that wasn't requested and I assume that didn't happen since it was a week before trial.

But to dismiss the case and then to not reinstate it in light of the fact that I just physically was in trial, I think would be an abuse of discretion. And again, we would ask that it be reinstated and set for trial Monday. I know that's probably not possible, but, you know, short of -- we could start a couple days from now if I had enough time to get my client. I'd spend the night and have my files sent up and have him bring it with him. We are ready to go and would be willing to proceed to trial as soon as possible.

**MR. NEVELOW:** We have nothing further, Your Honor.

**THE COURT:** The motion to reinstate is denied.

**MR. MORGAN:** Judge, we have an order there attached to that.

**MR. NEVELOW:** I don't have an order denying it, Your Honor.

**MR. MORGAN:** I think being optimistic, we said it was reinstated. You might want to take the order that's attached and where it says, "reinstated," just cross it out and put "denied."

**THE COURT:** Why don't you show it to Mr. Nevelow and let's see if we can get an agreement on the form.

**MR. MORGAN:** Judge, just for the record, does the Court find that there was not a reasonable explanation for the dismissal or does the Court find that there was a conscious indifference or intentional conduct that would result in the Court's ruling?

**THE COURT:** I do not find that any failure was due to an accident or mistake or that the failure has otherwise been reasonably explained.

**MR. MORGAN:** Thank you.

**MR. NEVELOW:** If you want me to prepare one just like that, we can both say on the record that that is what we will agree to. And I can get it typed up properly or you can just do it handwritten, either way.

**THE COURT:** I have made the changes suggested in hand and initialed those changes and signed the order.

**MR. NEVELOW:** I looked at that very quickly, Your Honor, so it's okay.

**THE COURT:** Thank you.

(Conclusion of hearing.)

NO. 430.189

| | | |
|---|---|---|
| KELLEBREW | * | IN THE 147TH JUDICIAL |
| | * | |
| VS. | * | DISTRICT COURT OF |
| | * | |
| FEATHERLITE PRECAST CORP. | * | TRAVIS COUNTY, TEXAS |

I, TABITHA A. BAKER, Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all proceedings in the above-entitled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits offered by the respective parties.

I further certify that the taxable court costs of this transcription if $114.50 to be paid by Mr. Richard J. Clarkson in said cause.

GIVEN UNDER MY HAND and seal of office on this the 6th day of January 1992.

/s/ Tabitha A. Baker
TABITHA A. BAKER, CSR #4593
CSR Expiration: 12/31/93

Business Address: Chapman Court Reporting Service
111 West Anderson Lane, Suite 222
Austin, Texas 78752
(512) 452-4072

## APPENDIX C

NO. 430.189

| | | |
|---|---|---|
| DAVID KELLEBREW | § | IN THE 147TH JUDICIAL |
| | § | |
| VS. | § | DISTRICT COURT OF |
| | § | |
| FEATHERLITE PRECAST CORPORATION | § | TRAVIS COUNTY, TEXAS |

*ORDER DENYING MOTION FOR CONTINUANCE*

On the 7th day of October, 1991, came on to be heard in open court the Plaintiff's Motion for Continuance. Both Plaintiff and Defendant were represented by counsel. A court reporter was available and took a record of the proceeding. The Court considered the pleadings and heard arguments of counsel.

After due consideration of the Court's findings, the Court determined that the Plaintiff's Motion for Continuance lacked merit and should be DENIED.

WHEREFORE, it is ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Continuance be, and hereby is, DENIED.

SIGNED: October 7, 1991.

/s/ Joseph H. Hart
JOSEPH H. HART
JUDGE PRESIDING

(Stamp illegible)

ENTERED TAXED

VL 2 2 8 3 PG 3 9 8

APPROVED AS TO FORM ONLY

READ, MORGAN & QUINN
801 Laurel Street
Beaumont, Texas 77001

By /s/ Richard Clarkson
Richard Clarkson

ATTORNEYS FOR PLAINTIFF, DAVID KELLEBREW

APPROVED AS TO FORM AND SUBSTANCE

BANKSTON, WRIGHT & GREENHILL
221 W. 6th Street, Suite 1800
Austin, Texas 78701
(512) 476-4600
FAX: (512) 476-5382
State Bar No. 14933580

By: /s/ Craig A. Nevelow
Craig A. Nevelow

ATTORNEYS FOR DEFENDANT,
FEATHERLITE PRECAST CORPORATION

VL 2283 PG 399

## APPENDIX D

NO. 430.189

| | | |
|---|---|---|
| DAVID KELLEBREW | § | IN THE 147TH JUDICIAL |
| | § | |
| VS. | § | DISTRICT COURT OF |
| | § | |
| FEATHERLITE PRECAST CORPORATION | § | TRAVIS COUNTY, TEXAS |

*ORDER OF DISMISSAL*

BE IT REMEMBERED that on the 7th day of October, 1991, came on to be heard the above-entitled cause wherein David Kellebrew is Plaintiff and Featherlite Precast Corporation is Defendant, in its regular order on the court's docket for trial on the merits; and came all parties; Plaintiff, by and through his attorneys, and Defendant, by and through its attorney of record Plaintiff announced that he was not ready to proceed and the Defendant announced that it was ready to proceed.

Plaintiff then announced to the Court that he refused to proceed with his case. The Court was of the opinion and found that Plaintiff's case should be dismissed.

IT IS THEREFORE ORDERED that the above action be and it is hereby dismissed without prejudice; that it be removed from the docket of the Court; and that all costs incurred be taxed against Plaintiff, for which let execution issue if not timely paid.

SIGNED: October 8, 1991.

/s/ Joseph H. Hart
JOSEPH H. HART
JUDGE PRESIDING

(Stamp illegible) ENTERED TAXED

VL 2 2 8 3 PG 4 1 7

APPROVED AND ENTRY REQUESTED

BANKSTON, WRIGHT & GREENHILL
221 W. 6th Street, Suite 1800
Austin, Texas 78701
(512) 476-4600
FAX: (512) 476-5382
State Bar No. 14933580

By: /s/ Craig A. Nevelow
Craig A. Nevelow

ATTORNEYS FOR DEFENDANT
FEATHERLITE PRECAST CORPORATION

VL 2 2 8 3 PG 4 1 8

## APPENDIX E

NO. 430.189

| | | |
|---|---|---|
| DAVID KELLEBREW | § | IN THE DISTRICT |
| | § | |
| VS. | § | COURT OF TRAVIS |
| | § | COUNTY, TEXAS |
| FEATHERLITE PRECAST | § | |
| CORP. | § | 147TH JUDICIAL |
| | § | DISTRICT |

**PLAINTIFF'S MOTION TO REINSTATE**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOT, DAVID KELLEBREW, plaintiff and files this Motion to Reinstate his case on the docket under Tex.R.Civ.P. 165a and will respectfully show the Court the following:

I.

Tex.R.Civ.P. 8 states:

> On the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge,

(Stamp illegible) ENTERED

KELLEBREW: 911016 M > Reinstate kim

> unless another attorney is specifically designated therein. Thereafter, until such designation is changed by written notice to the court and all other parties in accordance with Rule 21a, said attorney in charge shall be responsible for the suit as to such party.
>
> All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge.

Glen W. Morgan signed the first pleadings for the plaintiff in this case. He was then, and is now, the attorney of record for David Kellebrew in this case.

Glen W. Morgan is also the attorney of record under Tex.R.Civ.P. 8 in the case of *Debra Harris, et al v. Missouri Pacific Railroad Company, et al*, in Cause No. B-880, 112-C in the 163rd Judicial District Court of Orange County, Texas. A certified copy of the docket sheet in that case is attached as Exhibit "A". That case was called to trial on September 30, 1991, and the case was tried to a jury verdict on October 9, 1991.

II.

The case of *Debra Michelle Harris, et al v. Missouri Pacific Railroad Company, et al*, was on the "try or dismiss" docket for the weeks of September 30 and October 7, 1991. A copy of the Civil Jury Docket list is attached as Exhibit "B". A "Try or Dismiss" docket in the Orange County District Courts means that the case must be tried when it is called or it will be dismissed. Debra Michelle Harris and

her attorney, Glen W. Morgan, had no alternative but to try her case on September 30, 1991, when it was called to trial. Motions for Continuance are not granted in a case that is on the "try or dismiss" docket.

When it became apparent on October 3, 1991, that Judge John K. Dietz was not going to grant a continuance in this case, even though the trial in *Harris* was in progress, Debra Michelle Harris sought a continuance from the 163rd Judicial District Court. As one might expect from a Judge where a case had been in trial for a week, Judge Patrick Clark, acting pursuant to Judge David Dunn's request, "ordered that the trial presently underway continue until conclusion." See Exhibit "C".

III.

The case of *Debra Michelle Harris* was filed on February 11, 1988. Glen W. Morgan was the attorney of record for the plaintiff. This case was filed on October 28, 1987, and Glen W. Morgan was the attorney of record for David Kellebrew. Although the cases were only a few months apart in their filing in their respective courts, the case in the 163rd Judicial District Court was clearly on the "try or dismiss" docket. There was no indication that this case was on any "try or dismiss" docket.

IV.

After a hearing on October 7, 1991, this Court entered an order denying a Second Motion for Continuance. See Exhibit "D". On October 8, 1991, this Court entered an Order of Dismissal in the case. See Exhibit "E". Plaintiff files this Motion seeking the reinstatement of his case under Tex.R.Civ.P. 165a. Rule 165a(3) states in part:

> The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

"Intentional" and "conscious indifference" have been discussed a number of times by Texas courts. For example in *Sunrizon Homes, Inc. v. Fuller*, 747 S.W.2d 530, 532 (Tex.App. - San Antonio, 1988, no writ) the Court stated:

> Conscious indifference means the failure to take some action which would seem indicated to a person of reasonable sensibilities under the same or similar circumstances. *Johnson v. Edmonds*, 712 S.W.2d 651, 652 (Tex.App. - Fort Worth 1986, no writ). To determine whether there was intentional disregard or conscious indifference on the part of the defendant in failing to answer, the court must look to the knowledge and acts of the defendant. *Strackbein v. Prewitt*, 671 S.W.2d 37, 39 (Tex. 1984); *Royal Zenith Corporation v. Martinez*, 695 S.W.2d 327, 329 (Tex.App. - Waco, 1985, no writ).

At the October 7, 1991, hearing, this Court said it would take the notice of the docket sheet and the record in this case. (S.F.8). Mr Nevelow recited to the Court his version of the history of the case, including previous Motions for Continuance. Mr. Nevelow's recitation of "the facts" painted the plaintiff and his attorney of record in the worst light. Mr. Nevelow's long litany of complaints should not have formed the basis of this Court's decision to not grant the Motion for Continuance and to dismiss this case. As the

Court stated in *Wyatt v. Texas Oklahoma Exp. Inc.*, 693 S.W.2d 731, 733 (Tex.App. - Dallas, 1985, no writ).

> In resolving the question now before us, we recognize that, generally, the trial court is entitled to consider the entire history of the case and that the plaintiff's assertion at dismissal that she did not intend to abandon the case is immaterial. *Moore v. Armour & Co., Inc.*, 660 S.W.2d 577, 578 (Tex.Civ.App. - Ararillo 1983, no writ). However, when, as here, the plaintiff's past inactions have been forgiven by the trial court's proceeding to trial without dismissing the case because of those transgressions, a different circumstance is presented. *See Wm. T. Jarvis Co., Inc.*, 548 S.W.2d at 778 ("Thereafter the case lay dormant for two years and five months... However, from this point forward, Plaintiffs became active again...").

In the case at bar, Mr. Kellebrew and his attorney of record, Glen W. Morgan, went to trial in March, 1991. The case would have been tried and a final judgment entered in March but for the actions of Mr. Nevelow. It was the acts of counsel for the defendants which caused a mistrial in this case in March of 1991. For Mr. Nevelow in October, 1991, to go back to day one in this case and attempt to recreate a litany of complaints is inappropriate. This Court should have based its decision to grant or deny the Motion for Continuance or order a dismissal of the case for want of prosecution on what occurred in September and October, 1991.

V.

Mr. Kellebrew and his attorney have always wanted to go to trial in this case. In fact, they have filed Writs of

Mandamus on two occasions in an attempt to preserve that right. It is clear from the record in this case that the only reason the case did not go to trial on October 7, 1991, was because Glen W. Morgan was in trial in a lawsuit in Orange County, Texas. That case was on the "try or dismiss" docket. As the Court said in *Craig v. State*, 433 S.W.2d 713, 716 (Tex.Civ.App. - Tyler, 1968, ref'd, n.r.e.):

> Before a court is authorized to dismiss the cause for want of prosecution, the trial judge must reach the conclusion that plaintiff has intentionally abandoned the prosecution thereof, or that the facts are such that the law will imply an intent to abandon the prosecution. *Loftus v. Beckmann, et al.* (Tex.Com.App.), 1 S.W.2d 268, 270; *Johnson v. Campbell, et al.* (Tex.Civ.App.), 154 S.W.2d 878. It has been said that a case should not be dismissed on the ground of abandonment unless such abandonment clearly appears. *Loftus v. Beckmann, supra.*

Under the facts of this case it would be a clear abuse of discretion for this Court to find that plaintiff and his attorney of record had intentionally abandoned any intention of prosecuting this case to a final judgment.

VI.

In the recent Supreme Court case of *Dancy v. Hon. Allen J. Daggett*, 34 Tex.Sup.Ct.J. 828, 829 (1991), the Court had an opportunity to rule on a mandamus action with facts similar to those involved in the case that are now before this Court. The case arose out of a divorce proceeding wherein the trial judge set a hearing for temporary orders on April 16, 1991. Counsel for *Dancy* was notified of a hearing in Federal Court on April 16, 1991, and promptly filed a

motion to reset the hearing in the divorce case. On April 16, 1991, Judge Daggett reset the hearing in the divorce case for April 17, 1991. On the morning of the 17th, the Judge in the divorce case was notified by counsel for *Dancy's* office that counsel would not be able to appear at the hearing in the divorce case because the Federal hearing has been continued into April 17, 1991, as well. The trial judge refused to postpone the hearing and granted temporary orders in favor of *Dancy's* wife.

In that case, the Supreme Court ruled that the trial court's actions violated local rules regarding conflicts in docket settings, and effectively denied *Dancy* representation at the hearing on his divorce case. The Court stated:

> Under these circumstances, we hold that the trial court abused its discretion by refusing to continue the proceedings until such time as Dancy's counsel was available. We further hold that mandamus is an appropriate remedy under these facts, since the trial court's issuance of temporary orders is not subject to interlocutory appeal.

The action of this Court in requiring Glen W., Morgan to be in two courtrooms at the same time was a ruling that defies human experience. Bilocation has never been a requirement in Texas Courts of attorneys of record. It also violated Mr. Kellebrew's rights under Texas law to the effective assistance of counsel.

VII.

In the recent Supreme Court case of *Thordson v. City of Houston*, 34 Tex.Sup.Ct.J. 830 (1991), the Supreme Court held it was reversible error to not hold a hearing on a

Tex.R.Civ.P. 165a Motion for Reinstatement of the Case. This Motion is a Rule 165a Motion and David Kellebrew and his attorney of record, Glen W. Morgan, demand their right to have this matter set down for a hearing in which they can present evidence and oral arguments.

WHEREFORE, PREMISES CONSIDERED, plaintiff, David Kellebrew, prays that this Motion to Reinstate be granted and this cause be reinstated on the Court's docket.

Respectfully submitted,

READUD, MORGAN & QUINN
801 Laurel Street
Beaumont, Texas 77701
(409) 838-9941
(409) 833-8236 (FAX)

/s/ Glen W. Morgan
By: Glen W. Morgan
Texas Bar No. 14438900

Lawyers for Plaintiff

KELLEBREW: 911016 M > Reinstate kim

## APPENDIX F

STATE OF TEXAS §
§ VERIFICATION
COUNTY OF JEFFERSON §

BEFORE ME, the undersigned authority, on this day personally appeared Glen W. Morgan, who, upon oath, deposes and says that he is the attorney of record for the plaintiff, and who, upon his oath, says that he has personal knowledge that the statements contained in the foregoing Motion are in all things true and correct, and that the attached exhibits are true and correct copies.

/s/ Glen W. Morgan
GLEN W. MORGAN

SUBSCRIBED AND SWORN TO before me by the said Glen W. Morgan on this the 17th day of October, 1991, to certify which witness my hand and seal of office.

(Stamp illegible)

/s/ illegible
Notary Public In and For
The State of Texas

*CERTIFICATE OF SERVICE*

I hereby certify that on the 17th day of October, 1991, I have served a true copy of the above and foregoing on the adverse parties by forwarding a copy of same to all opposing counsel herein.

Glen W. Morgan
Glen W. Morgan

KELLEBREW: 911016 M > Reinstate kim

# CIVIL DOCKET

| NUMBER OF CASE | NAMES OF PARTIES | ATTORNEYS | Kind of Action and Party Demanding Jury | DATE OF FILING | | |
|---|---|---|---|---|---|---|
| B 880112 | DEBRA MICHELLE HARRIS | GLEN W. MORGAN | | Month | Day | year |
| | V. | Pltf. | AUTO DAMAGES | 2 | 11 | 88 |
| FEE BOOK | MISSOURI PACIFIC RAIL ROAD CO INDIVIDUALLY AND D/B/A | SPN&B MICHAEL L. BAKER | | Jury Fee, 10.00 | | |
| Vol / Page | UNION PACIFIC RAILROAD AND J. O. FISHER | Deft. | | Reaud, Morgan | | |
| | | | | Paid by Quinn | | |

| DATE OF ORDERS | | | ORDERS OF THE COURT |
|---|---|---|---|
| Mo. | Day | Year | |
| 5 | 16 | 89 | Notice of Intent to Dismiss |
| 5 | 25 | 89 | Order to Retain Signed; Docket Control Conferance set June 16, 1989 at 11 a.m. |
| 6 | 16 | 89 | Docket control order signed; Trial set December 4, 1989; Mr. Morgan failed to appear. |
| 10 | 30 | 89 | Order on agreed Joint Motion for Continuance signed; granted. |
| 1 | 11 | 90 | Plaintiff's motion to inspect heard; motoin granted in part and denied in part; order to be prepared |

EXHIBIT " A "

# CIVIL DOCKET

| NUMBER OF CASE | | | | |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |

| DATE OF ORDER | | |
|---|---|---|
| MO. | Day | Year |
| 1 | 12 | 90 |
| 6 | 21 | 90 |
| 8 | 20 | 90 |
| 3 | 28 | 91 |
| | | |
| | | |
| | | |
| | | |

Order on plaintiff's motion to in spect signed;

Motion to compell and for sanctions heard together with defendant's motion taken under advisement sending court's reading of both parties experts deposition.
Order granting motion for continuance signed.

Motion to compell and sanctions heard and portion dealing with second inspection continued; motion with regard to first inspection taken under advisement pending review of cases and orders

# CIVIL DOCKET

| NUMBER OF CASE | NAMES OF PARTIES | ATTORNEYS | Kind of Action and Party Demanding Jury | DATE OF FILING | | |
|---|---|---|---|---|---|---|
| B 880112 | DEBRA MICHELLE HARRIS | GLEN MORGAN<br>ALTO WATSON | | Month | Day | year |
| | V. | Pltf. | AUTO DAMAGES | 2 | 11 | 88 |
| FEE BOOK | MISSOURI PACIFIC RAIL-ROAD CO INDIVIDUALLY AND D/B/A | MIKE BAKER<br>MIKE BRIDWELL | | | | |
| Vol / Page | UNION PACIFIC RAILROAD AND J. O. FISHER | Deft. | | | | |

| DATE OF ORDERS | | | ORDERS OF THE COURT |
|---|---|---|---|
| Mo. | Day | Year | |
| 5 | 30 | 91 | Order granting motion for continuance signed;case reset for July 15, 1991 #1 |
| 9 | 30 | 91 | Motion for partial summary judgment heard and order signed denying motion; motion of plaintiff for leave to amend heard and denied;Plaintiff's motion in limine heard and granted; Defentants motion in limine heard supplemental motion iheard and order signed; a jury was selected and impaneled. |
| | | | |
| | | | |
| 10 | 1 | 91 | The presentation of evidence commenced and continued from day to day; order granting leave to supplemen discovery signed; motion for sanctions heard andtaken under advisement; order allowing Wayne McClelland to testify signed on October 7, 1991; order granting motion for sanctions signed both sides rested on October 8, 1995; the charge was read to the jury |
| | | | |
| | | | |
| | | | |

# CIVIL DOCKET

| NUMBER OF CASE | | | | | |
|---|---|---|---|---|---|
| B 880112 | | | | | |
| | | | | | |
| | | | | | |
|

DAVID A. DUNN
DISTRICT JUDGE
163RD JUDICIAL DISTRICT
ORANGE, TEXAS 77630

| | |
|---|---|
| JO STANFIELD - Court Reporter | TELEPHONE: |
| PATRICIA RICHARD - Court Coordinator | (409) 883-7740 EXTENSION: |
| DONALD BLANCHARD - Bailiff | 247-248 |

*CIVIL JURY DOCKET*

IN THE 163RD DISTRICT COURT - ORANGE COUNTY, DAVID A. DUNN, JUDGE

DOCKET CALL - September 20, 1991
10:00 a.m.
TRIAL WEEK - September 30, 1991
October 7, 1991

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ALL EXCEPTIONS, MOTIONS, SPECIAL PLEAS, ETC. must be filed and heard with both parties present at said hearing no later than the Monday preceding docket call. MOTIONS FOR CONTINUANCES SHALL be filed no later than (5) working days from the docket call setting.

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**EXHIBIT**

**"B"**

| | |
|---|---|
| B860822-C | |
| Margaret Helen McNeil and Robert McNeil | Paul D. Henderson |
| vs. | |
| Jack-Eckard Corporation | James K. Gardner<br>Thomas W. Duesler<br>Marc A. Sheiness |

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| | |
|---|---|
| B880112-C | |
| Debra Michelle Harris and Charles E. Harris | Glen Morgan |
| vs. | TRY OR DISMISS |
| Missouri Pacific RR Co., Inc. and a/b/a Union Pacific RR, et al | Mike Baker |

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| | |
|---|---|
| B880126 | |
| Mauriceville National Bank | Gary Coker |
| vs. | TRY OR DISMISS |
| C & R Construction | Thomas Sibley |

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| | |
|---|---|
| B880305-C | |
| Mary V. Withrow, Ind. and as Independent Executrix of Estate of James William Withrow, deceased | Diane Dwight |
| vs. | TRY OR DISMISS |
| Clemetex, LTD, et al | Barbara J. Barron<br>William Coffey, Jr.<br>Kyle Wheelus, Jr. |

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B880736-C

| | |
|---|---|
| Kenneth V. Alexander | Larry C. Hunter |
| vs. | TRY OR DISMISS |
| W. L. McDaniel, et al | Bob K. Monk |

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B880840-C

| | |
|---|---|
| Lacy Aden | David Dies |
| vs. | TRY OR DISMISS |
| The Carlton Machine Tool | David J. Fisher |
| | Michael J. Reviere |

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B880932-C

| | |
|---|---|
| David Stanley | Carl Waldman |
| vs. | TRY OR DISMISS |
| Southern Pacific Transportation | Milton G. Shuffield |

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B890168-C

| | |
|---|---|
| Christopher Earl Roberts | J. Donald Corona, Jr. |
| vs. | TRY OR DISMISS |
| The Black Clawson Company and Black Clawson Enterprises Standard Fire Ins. | William B. Coffey, Jr.<br>Stephen Rabclis<br>Elizabeth A. Brown |

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B890021

| | |
|---|---|
| Marie T. Browning | Louis Dugas |
| vs. | |
| The City of Orange | John Cash Smith |

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B890059

| | |
|---|---|
| David Wayne Rutledge | David Dies |
| vs. | TRY OR DISMISS |
| Sherry Lynne Lewis | John Cash Smith |
| | Larry C. Hunter |

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B890390

| | |
|---|---|
| Mrs. Rose Allen | Clay Dugas |
| vs. | TRY OR DISMISS |
| Ginger Simpson in Her Capacity as Bridge City Council Member, and in Her Individual Capacity | John W. Newton, III |

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B890599

| | |
|---|---|
| Kirk and Susan Frank | Clay Dugas |
| vs. | TRY OR DISMISS |
| Amy Weakley, dba Amy Weakley Realtors | Walter D. Snider |

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B890787-C

| | |
|---|---|
| Tommie Darlene Arceneaux, et al | Warren Clark |
| vs. | TRY OR DISMISS |
| Younger Brothers, et al | Charles Lyman |

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B900038-C

| | |
|---|---|
| Neff Brothers Automotive Service, Inc. | Keith Giblin<br>Garry A. Offerman |
| vs. | |
| Robert Ray Meeks | Claude R. LeMasters |
| J.B.L., INC. and Petro-Chemical Transport, Inc. | Brian M. Chandler<br>Lipscomb Norvell, Jr. |

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B900143-C

| | |
|---|---|
| Rebecca Lynn Eckert | John Cash Smith |
| vs. | |
| Karla Ann Blacksher | Gordon Pate |

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| | |
|---|---|
| B900198-C | |
| Debra Baleda Shivers | Jonathan C. Juhan |
| vs. | |
| Floyd Leroy Mitchell | Gordon R. Pate |

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| | |
|---|---|
| B900731 | |
| Joe W. Leviness | Donald Carona, Jr. |
| vs. | |
| J. M. Huber Corporation | Martin L. Mayo |

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| | |
|---|---|
| B910418-C | |
| West Orange Cove Consolidated Independent School District | Mitchell A. Toups |
| vs. | |
| Bessie P. Mayfield | George Barron |

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| | |
|---|---|
| B910255-C | |
| James D. Cunningham | Glen Morgan |
| vs. | |
| Lumberman's Mutual Casualty Co. | T. Lynn Walden |

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| | |
|---|---|
| B22516-D | |
| Mary Borel | Paul Clayton |
| and | |
| Ira Borel and in the interest of children | Steve Carlton |

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NO B-880,112-C

| | | |
|---|---|---|
| DEBRA MICHELLE HARRIS | § | IN THE DISTRICT |
| | § | COURT OF |
| | § | |
| VS. | § | |
| | § | ORANGE COUNTY, |
| MISSOURI PACIFIC | § | TEXAS |
| RAILROAD COMPANY, | § | |
| INDIVIDUALLY AND | § | |
| D/B/A/ UNION PACIFIC | § | |
| RAILROAD AND | § | 163RD JUDICIAL |
| J.O. FISHER | § | DISTRICT |

ORDER

ON THIS the 4th day of Oct., 1991, came on to be presented the Motion for Continuance and the Court being of the opinion that the same should be DENIED, it is therefore,

ORDERED that the trial presently underway continue until conclusion.

SIGNED this 4th day of Oct., 1991.

/s/ Pat Clark
JUDGE PRESIDING

FILED
91 OCT -4 PM 3:41
BILLY MINTER
DISTRICT COURT
ORANGE COUNTY TEXAS
BY /s/ illegible

**EXHIBIT**
. . . . . **"C"**

NO. 430,189

| | | |
|---|---|---|
| DAVID KELLEBREW | § | IN THE 147TH JUDICIAL |
| | § | |
| VS. | § | DISTRICT COURT OF |
| | § | |
| FEATHERLITE PRECAST CORPORATION | § | TRAVIS COUNTY, TEXAS |

*ORDER DENYING MOTION FOR CONTINUANCE*

On the 7th day of October, 1991, came on to be heard in open court the Plaintiff's Motion for continuance. Both Plaintiff and Defendant were represented by counsel. A court reporter was available and took a record of the proceeding. The Court considered the pleadings and heard arguments of counsel.

After due consideration of the Court's findings, the Court determined that the Plaintiff's Motion for Continuance lacked merit and should be DENIED.

WHEREFORE, it is ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Continuance be, and hereby is, DENIED.

SIGNED: October 7, 1991.

Joseph H. Hart
JOSEPH H. HART
JUDGE PRESIDING

**EXHIBIT**

**"D"**

APPROVED AS TO FORM ONLY:

READ, MORGAN & QUINN
801 Laurel Street
Beaumont, Texas 77001

By Richard Clarkson
Richard Clarkson

ATTORNEYS FOR PLAINTIFF, DAVID KELLEBREW

APPROVED AS TO FORM AND SUBSTANCE:

BANKSTON, WRIGHT & GREENHILL
221 W. 6th Street, Suite 1800
Austin, Texas 78701
(512) 476-4600
FAX: (512) 476-5382
State Bar No. 14933580

By: Craig A. Nevelow
Craig A. Nevelow

ATTORNEYS FOR DEFENDANT,
FEATHERLITE PRECAST CORPORATION

NO. 430,189

| | | |
|---|---|---|
| DAVID KELLEBREW | § | IN THE 147TH JUDICIAL |
| | § | |
| VS. | § | DISTRICT COURT OF |
| | § | |
| FEATHERLITE PRECAST CORPORATION | § | TRAVIS COUNTY, |
| | § | TEXAS |

*ORDER OF DISMISSAL*

BE IT REMEMBERED that on the 7th day of October, 1991, came on to be heard the above-entitled cause wherein David Kellebrew is Plaintiff and Featherlite Precast Corporation is Defendant, in its regular order on the court's docket for trial on the merits; and came all parties; Plaintiff, by and through his attorneys, and Defendant, by and through its attorney of record. Plaintiff announced that he was not ready to proceed and the Defendant announced that it was ready to proceed.

Plaintiff then announced to the Court that he refused to proceed with his case. The Court was of the opinion and found that Plaintiff's case should be dismissed.

IT IS THEREFORE ORDERED that the above action be and it is hereby dismissed without prejudice; that it be removed from the docket of the Court; and that all costs incurred be taxed against Plaintiff, for which let execution issue if not timely paid.

SIGNED: October 8, 1991.

/s/ Joseph H. Hart
JOSEPH H. HART
JUDGE PRESIDING

OCT 6
(Stamp illegible)

**EXHIBIT**

**"E"**

APPROVED AND ENTRY REQUESTED:

BANKSTON, WRIGHT & GREENHILL
221 W. 6th Street, Suite 1800
Austin, Texas 78701
(512) 476-4600
FAX: (512) 476-5382
State Bar No. 14933580

By: Craig A. Nevelow
Craig A. Nevelow

ATTORNEYS FOR DEFENDANT,
FEATHERLITE PRECAST CORPORATION

I, AMALIA RODRIGUEZ-MENDOZA, District Clerk of Travis County, Texas, do hereby certify that this is a true and correct copy of Order of Dismissal as same appears of record in my office Witness my hand and seal of office on 8th day of October, 1991.

AMALIA RODRIGUEZ-MENDOZA
DISTRICT CLERK
BY Carla McElroy
DEPUTY

NO. 430,189

| | | |
|---|---|---|
| DAVID KELLEBREW | § | IN THE DISTRICT COURT |
| | § | OF |
| VS. | § | TRAVIS COUNTY, TEXAS |
| | § | |
| FEATHERLITE PRECAST CORP. | § | 147TH JUDICIAL |
| | § | DISTRICT |
| STATE OF TEXAS | § | |
| | § | AFFIDAVIT |
| COUNTY OF ORANGE | § | |

BEFORE ME, the undersigned authority, on this date personally appeared David A. Dunn, who, upon oath, deposes and says:

I am the presiding Judge of the 163rd Judicial District Court of Orange County, Texas, and I have personal knowledge of the truth and correctness of the following facts and of the exhibits attached to this affidavit.

On February 11, 1988, a case styled *Debra Michelle Harris v. Missouri Pacific Railroad Company, Individually and d/b/a Union Pacific Railroad, and J.O. Fisher*, Cause No. B-880,112-C was filed in my court. Glen Morgan and Alto V. Watson, III, were the attorneys for the plaintiff. A true and correct copy of the civil docket sheets for this case are attached to this Affidavit as Exhibit "A".

(FILED Stamp illegible) ENTERED

On September 20, 1991, there was a civil jury docket call held. The case of *Debra Michelle Harris v. Missouri Pacific Railroad Company* was the No. 2 case on that jury docket and it was set for trial as the No. 1 case, commencing on September 30, 1991. The *Harris* case was on this court's "Try or Dismiss" docket. This court would not have granted the plaintiff a continuance because her attorney, Glen Morgan, was set on the jury docket of the Travis County District Courts for the week of October 7, 1991, as the 8th or 9th case. It is the practice here that a case on the "Try or Dismiss" docket will not be granted a continuance. A true and correct copy of the civil jury docket sheet for my court is attached as Exhibit "B". The case of *Debra Michelle Harris* was set by me as the No. 1 case for September 30, 1991, and it had to go to trial on that date and continue until its conclusion.

On October 3, 1991, while the trial of the *Harris* case was still in progress, this Court was informed by Glen W. Morgan and Judge Patrick A. Clark of the 128th Judicial District Court of Orange County, Texas, that Judge John K. Dietz, District Judge of the 250th Judicial District Court in Travis County, Texas, had denied a Motion for Continuance in the case of *David Kellebrew v. Featherlite Precast Corp.*, Cause No. 430,189 in the 147th Judicial District court of Travis County, Texas. Judge Clark told me that he had spoken to Judge Dietz and informed him that Mr. Morgan and Mr. Watson were in trial in

my court. I called Judge Dietz' office in Austin and attempted to speak with him. His secretary told m that he was not available at that time. I confirmed that Mr. Morgan and Mr. Watson were in my court actually in trial. I gave his secretary my name and phone number and requested that Judge Dietz call me so that we might discuss this conflict in trial schedules. I wanted to explain to Judge Dietz that I would not have granted Glen Morgan a continuance at the docket call on September 20th, let alone in the middle of the trial of the *Harris* case. *Harris* was on the "Try or Dismiss" docket and was going to be tried on September 30th or be dismissed. Judge Dietz never returned my phone call.

On October 4, 1991, Mr. Morgan filed a written Motion for Continuance in my court seeking to stop the trial of the *Harris* case in mid-passage so that he could go to Austin and try the *Kellebrew* case during the week of October 7, 1991, until its conclusion. Because of my absence from the courthouse on the afternoon of October 4, 1991, I instructed Patrick A. Clark to sign an order denying the plaintiff's Motion for Continuance and ordering "... that the trial presently underway continue until conclusion." The trial in the *Harris* case continued until October 9, 1991. Attached to this Affidavit as Exhibit "C" is a true and correct copy of that order of October 4, 1991, signed by Judge Clark.

Further, Affiant sayeth not.

/s/ David A. Dunn
JUDGE DAVID DUNN

SUBSCRIBED AND SWORN TO BEFORE ME by the said affiant on this the 29 day of October, 1991.

/s/ Patricia Richard
Print Name of Notary
Notary Public in and for:

# CIVIL DOCKET

| NUMBER OF CASE | NAMES OF PARTIES | ATTORNEYS | Kind of Action and Party Demanding Jury | DATE OF FILING | | |
|---|---|---|---|---|---|---|
| B 880112 | DEBRA MICHELLE HARRIS | GLEN W. MORGAN | | Month | Day | year |
| | V. | Pltf. | AUTO DAMAGES | 2 | 11 | 88 |
| FEE BOOK | MISSOURI PACIFIC RAIL-ROAD CO INDIVIDUALLY AND D/B/A | SPN&B MICHAEL L. BAKER | | Jury Fee, 10.00 | | |
| Vol / Page | UNION PACIFIC RAILROAD AND J. O. FISHER | Dcft. | | Reaud, Morgan | | |
| | | | | Paid by Quinn | | |

| DATE OF ORDERS | | | ORDERS OF THE COURT |
|---|---|---|---|
| Mo. | Day | Year | |
| 5 | 16 | 89 | Notice of Intent to Dismiss |
| 5 | 25 | 89 | Order to Retain Signed; Docket Control Conferance set June 16, 1989 at 11 a.m. |
| | | | |
| 6 | 16 | 89 | Docket control order signed; Trial set December 4, 1989; Mr. Morgan failed to appear. |
| 10 | 30 | 89 | Order on agreed Joint Motion for Continuance signed; granted. |
| 1 | 11 | 90 | Plaintiff's motion to inspect heard; motoin granted in part and denied in part; order to be prepared |
| | | | |
| | | | |

EXHIBIT "A"

# CIVIL DOCKET

| NUMBER OF CASE | NAMES OF PARTIES | ATTORNEYS | Kind of Action and Party Demanding Jury | DATE OF FILING | | |
|---|---|---|---|---|---|---|
| B 880112 | DEBRA MICHELLE HARRIS | GLEN MORGAN<br>ALTO WATSON | | Month | Day | year |
| | V. | Pltf. | AUTO DAMAGES | 2 | 11 | 88 |
| FEE BOOK | MISSOURI PACIFIC RAIL-ROAD CO INDIVIDUALLY AND D/B/A | MIKE BAKER<br>MIKE BRIDWELL | | | | |
| Vol / Page | UNION PACIFIC RAILROAD AND J. O. FISHER | Deft. | | | | |

| DATE OF ORDERS | | | ORDERS OF THE COURT |
|---|---|---|---|
| Mo. | Day | Year | |
| 5 | 30 | 91 | Order granting motion for continuance signed;case reset for July 15, 1991 #1 |
| 9 | 30 | 91 | Motion for partial summary judgment heard and order signed denying motion; motion of plaintiff for leave to amend heard and denied;Plaintiff's motion in limine heard and granted; Defentants motion in limine heard supplemental motion iheard and order signed; a jury was selected and impaneled. |
| 10 | 1 | 91 | The presentation of evidence commenced and continued from day to day; order granting leave to supplemen discovery signed; motion for sanctions heard andtaken under advisement; order allowing Wayne McClelland to testify signed on October 7, 1991; order granting motion for sanctions signed both sides rested on October 8, 1995; the charge was read to the jury |

72a

# CIVIL DOCKET

| NUMBER OF CASE | | | | |
|---|---|---|---|---|
| B 880112 | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

Final arguments were presented and the jury retired to deliberate; order on findings of facts signed; the jury returned with a verdict which was accepted by the court at 4:33 p.m.; the jury was discharged.

**DAVID A. DUNN**
DISTRICT JUDGE
163RD JUDICIAL DISTRICT
ORANGE, TEXAS 77630

JO STANFIELD-Court Reporter TELEPHONE (409)883-
PATRICIA RICHARD-Court Coordinator Extension 247
DONALD BLANCHARD-Bailiff

*CIVIL JURY DOCKET*

IN THE 163RD DISTRICT COURT - ORANGE COUNTY,
DAVID A. DUNN, JUDGE

DOCKET CALL - September 20, 1991
10:00 a.m.

TRIAL WEEK - September 30, 1991
October 7, 1991

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ALL EXCEPTIONS, MOTIONS, SPECIAL PLEAS, ETC. must be filed and heard with both parties present at said hearing no later than the Monday preceding docket call. MOTIONS FOR CONTINUANCES SHALL be filed no later than (5) working days from the docket call setting.

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**EXHIBIT**

"B"

B860822-C

| | |
|---|---|
| Margaret Helen McNeil and Robert McNeil | Paul D. Henderson |
| vs. | |
| Jack-Eckard Corporation | James K. Gardner<br>Thomas W. Duesler<br>Marc A. Sheiness |

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B880112-C

| | |
|---|---|
| Debra Michelle Harris and Charles E. Harris | Glen Morgan |
| vs. | TRY OR DISMISS |
| Missouri Pacific RR Co., Ind. and d/b/a/ Union Pacific RR, et al | Mike Baker |

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B880126

| | |
|---|---|
| Mauricevill National Bank | Gary Coker |
| vs. | TRY OR DISMISS |
| C & R Construction | Thomas Sibley |

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b890599

| | |
|---|---|
| Kirk and Susan Frank | Clay Dugas |
| vs. | TRY OR DISMISS |
| Amy Weakley, dba Amy Weakley Realtors | Walter D. Snider |

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B890787-C

| | |
|---|---|
| Tommie Darlene Arceneaux, et al | Warren Clark |
| vs. | TRY OR DISMISS |
| Younger Brothers, et al | Charles Lyman |

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| | |
|---|---|
| B900038-C | |
| Neff Brothers Automotive Service, Inc. | Keith Giblin<br>Garry A. Offerman |
| vs. | |
| Robert Ray Meeks<br>J.B.L., Inc. and Petro-Chemical Transport, Inc. | Claude R. LeMasters<br>Brian M. Chandler<br>Lipscomb Norvell, Jr. |

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| | |
|---|---|
| B900143-C | |
| Rebecca Lynn Eckert | John Cash Smith |
| vs. | |
| Karla Ann Blacksher | Gordon Pate |

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|---|---|
| B900198-C | |
| Debra Baleda Shivers | Jonathan C. Juhan |
| vs. | |
| Floyd Leroy Mitchell | Gordon R. Pate |

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|---|---|
| B900731 | |
| Joe W. Leviness | Donald Carona, Jr. |
| vs. | |
| J.M. Huber Corporation | Martin L. Mayo |

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| | |
|---|---|
| B910418-C | |
| West Orange Cove Consolidated Independent School District | Mitchell A. Toups |
| vs. | |
| Bessie P. Mayfield | George Barron |

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| | |
|---|---|
| B910255-C | |
| James D. Cunningham | Glen Morgan |
| vs. | |
| Lumberman's Mutual Casualty Co. | T. Lynn Walden |

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B22516-D
Mary Borel — Paul Clayton
and
Ira Borel and in the interest of children — Steve Carlton

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B880305-C
Mary V. Withrow, Ind. and as Independent Executrix of Estate of James William Withrow, deceased — Diane Dwight
vs. TRY OR DISMISS
Clemetex, LTD, et al — Barbara J. Barron
William Coffey, Jr.
Kyle Wheelus, Jr.

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B880736-C
Kenneth V. Alexander — Larry C. Hunter
vs. TRY OR DISMISS
W. L. McDaniel, et al — Bob K. Monk

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B880840-C
Lacy Aden — David Dies
vs. TRY OR DISMISS
The Carlton Machine Tool — David J. Fisher
Michael J. Reviere

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B880932-C
David Stanley — Carl Waldman
vs. TRY OR DISMISS
Southern Pacific Transportation — Milton G. Shuffield

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B890168-C

| | |
|---|---|
| Christopher Earl Roberts | J. Donald Corona, Jr. |
| vs. | TRY OR DISMISS |
| The Black Clawson Company and Black Clawson Enterprises Standard Fire Ins. | William B. Coffey, Jr.<br>Stephen Rabclis<br>Elizabeth A. Brown |

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B890021

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|---|---|
| Marie T. Browning | Louis Dugas |
| vs. | |
| The City of Orange | John Cash Smith |

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B890059

| | |
|---|---|
| David Wayne Rutledge | David Dies |
| vs. | TRY OR DISMISS |
| Sherry Lynne Lewis | John Cash Smith<br>Larry C. Hunter |

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B890390

| | |
|---|---|
| Mrs. Rose Allen | Clay Dugas |
| vs. | TRY OR DISMISS |
| Ginger Simpson in Her Capacity as Bridge City Council Member, and in Her Individual Capacity | John W. Newton, III |

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| | |
|---|---|
| **DEBRA MICHELLE HARRIS** | § **IN THE DISTRICT** |
| | § **COURT OF** |
| **VS.** | § |
| | § **ORANGE COUNTY,** |
| **MISSOURI PACIFIC** | § **TEXAS** |
| **INDIVIDUALLY AND D/B/A** | § |
| **UNION PACIFIC RAILROAD** | § **163RD JUDICIAL** |
| **AND J. O. FISHER** | § **DISTRICT** |

**ORDER**

ON THIS the 4th day of Oct., 1991, came on to be presented the Motion for Continuance and the Court being of the opinion that the same should be DENIED, it is therefore,

ORDERED that the trial presently underway continue until conclusion.

SIGNED this 4th day of Oct., 1991.

/s/ Pat Clark
**JUDGE PRESIDING**

**FILED**
**91 OCT - 4 PM 3:41**
**BILLY MINTER**
**DISTRICT COURT**
**ORANGE COUNTY, TEXAS**
**BY /s/ illegible**

**EXHIBIT**

**"C"**

NO. 430,189

| | | |
|---|---|---|
| DAVID KELLEBREW | § | IN THE DISTRICT COURT |
| | § | |
| | § | OF TRAVIS COUNTY, |
| VS. | § | TEXAS |
| | § | |
| FEATHERLITE PRECAST CORP. | § | 147TH JUDICIAL DISTRICT |

**ORDER**

On this the _____ day of _____, 1991, came on to be heard the Plaintiff's Motion to Reinstate the above entitled and numbered cause, and it appearing to the Court that the Motion should be DENIED in all things; it is, therefore

ORDERED, ADJUDGED and DECREED by the Court that said Motion be, and is hereby, DENIED.

SIGNED this 13th day of November, 1991.

/s/ illegible
JUDGE PRESIDING

NOV 13 8 AM '91
(Stamp illegible)

**ENTERED**

VL 2303 PG 795

**THE SUPREME COURT OF TEXAS**

P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 24, 1991

Mr. Richard J. Clarkson
Reaud, Morgan & Quinn
801 Laurel Street
Beaumont, TX 77701

Mr. Glen W. Morgan
Reaud, Morgan & Quinn
801 Laurel Street
Beaumont, TX 77701

Mr. Alto V. Watson, III
Reaud, Morgan & Quinn, Inc.
801 Laurel Street
Beaumont, TX 77701

Mr. Craig A. Nevelow
Wright & Greenhill
221 West 6th Street
Suite 1800
Austin, TX 78701

RE: Case No. D-3196
Style: DAVID KELLEBREW
v. FEATHERLITE PRECAST CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey, Deputy Clerk

**RECEIVED**
**MAR 25 1993**

**IN THE COURT OF APPEALS, THIRD DISTRICT OF TEXAS,**

**AT AUSTIN**

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**JUDGMENT RENDERED OCTOBER 21, 1992**

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*NO. 3-92-008-CV*

DAVID KELLEBREW V. FEATHERLITE PRECAST CORPORATION

APPEAL FROM 147TH DISTRICT COURT OF TRAVIS COUNTY

BEFORE CHIEF JUSTICE CARROLL, JUSTICES ABOUSSIE AND B.A. SMITH

AFFIRMED ON MOTION FOR REHEARING -- OPINION BY CHIEF JUSTICE CARROLL

THIS CAUSE came on to be submitted to the Court appellant's motion for rehearing, and the Court having fully considered same and being of the opinion that same; and being of the opinion that same should be overruled and that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that appellant's motion for rehearing be and is hereby overruled; that the opinion and judgment of this Court, dated August 26, 1992, be and are hereby withdrawn; and that the judgment of the trial court be in all things affirmed. It is FURTHER ordered that the appellant, David Kellebrew, as principal, and Glen W. Morgan of Reaud, Morgan & Quinn, Inc., 801 Laurel, Beaumont, Texas 77701, and Wayne A. Reaud of Reaud, Morgan & Quinn, 801 Laurel, Beaumont,

Texas 77701, as sureties on the cost bond on appeal herein, pay all costs related to this appeal and that this decision be certified below for observance.

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

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ON MOTION FOR REHEARING

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*NO. 3-92-008-CV*

DAVID KELLEBREW,
APPELLANT

vs.

FEATHERLITE PRECAST CORPORATION,
APPELLEE

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FROM THE DISTRICT COURT OF TRAVIS COUNTY,
147TH JUDICIAL DISTRICT
NO. 430,189, HONORABLE JOSEPH HART, JUDGE
PRESIDING

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The prior opinion and judgment of this Court, dated August 26, 1992, are withdrawn and the following substituted.

In three points of error, David Kellebrew appeals from the trial court's judgment refusing to reinstate his cause after dismissal, and from its denial of two motions for

continuance. We will overrule all three points of error and affirm the trial court's judgment.

## THE CONTROVERSY

This lawsuit arose out of an accident that occurred in November 1985. Kellebrew filed suit in October 1987. In January 1989, the court granted Kellebrew's motion to continue the scheduled hearing on Featherlite's motion for summary judgment. Kellebrew later filed a motion for continuance on May 16, 1990, based on counsel's being involved in the trial of a federal class action lawsuit. In his brief, Kellebrew states that no order concerning this motion is in the record. In its brief, Featherlite states that it agreed to the continuance and no order was issued.[1]

Featherlite then, by letter, suggested a January trial setting but agreed to Kellebrew's request for a March setting, notifying Kellebrew on June 21, 1990, that the case was set for March 4, 1991 (first on docket). On February 20, 1991, eight months after notification and twelve days before trial, Kellebrew moved for a continuance. The trial court denied the motion with a notation that the conflicting case setting offered as a reason for continuance had not been set until December 1990, months after the Featherlite setting in Travis County, and that counsel failed to move for continuance until

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1. In the statement of facts from the hearing on the October 3, 1991, motion for continuance, a copy of a letter dated May 24, 1990, from Featherlite's counsel to Kellebrew's counsel appears. The letter says that a member of Judge Hart's staff and Featherlite's counsel agreed to place the motion for continuance in the file unsigned because although the continuance was agreed, counsel for both sides had not agreed on a new trial date. Therefore, Featherlite did not want the judge to sign the order and assign a trial date. The letter proposed a January 1991 setting. In response, Kellebrew's counsel requested a March setting but did not dispute that Featherlite had agreed to a continuance.

well after December. Trial began on March 6, but resulted in a mistrial during voir dire.

Featherlite advised Kellebrew that it would seek a setting on either October 7 or 21, 1991. On March 14, 1991, Featherlite sent a letter to Kellebrew notifying counsel of a setting for October 7, 1991. In the letter Featherlite specifically asked about any conflicting trial settings, requested the earliest possible notice of any conflicts, and informed Kellebrew that, should he seek another continuance, Featherlite would advise the judge hearing the motion that, as of the date of the letter, no conflicts had been brought to Featherlite's or the court's attention. On September 30, 1991, Kellebrew filed a motion for continuance on the basis that a trial in Orange County would run over into the Travis County setting. The motion for continuance was denied.

On the day the case was called, Kellebrew appeared with an attorney from the same firm as his attorney-of-record and again requested a continuance. The continuance was denied and the case called for trial. Counsel for Kellebrew announced at that time, in open court, that he would not proceed to select a jury that afternoon, at which time the court dismissed the cause. A motion to reinstate was heard on November 13, 1991, and denied.

## MOTIONS FOR CONTINUANCE

In his first two points of error, appellant contends that the trial court erred in denying his motions for continuance filed on September 30, 1991, and October 7, 1991. The grant or denial of a motion for continuance is within the sound discretion of the trial court and will not be reversed unless the record shows a clear abuse of discretion. *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 634 (Tex. 1986).

The test for an abuse of discretion is whether the trial court acted without reference to any guiding rules or principles, that is, in an arbitrary and unreasonable manner. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986). That the reviewing court might decide the matter differently under similar circumstances does not result in the trial court's having abused its discretion. *Downer*, 701 S.W.2d at 242. We view the evidence in the light most favorable to the action of the trial court and indulge every presumption in its favor. *Sims v. State*, 816 S.W.2d 502, 508 (Tex. App. - Houston [1st Dist.] 1991, writ denied).

A more detailed statement of the test for "abuse of discretion" is (1) whether the trial court's exercise of discretion was legally erroneous; and (2) if it were, whether the impact of the error requires reversal. *Reyna v. Reyne*, 738 S.W.2d 772, 774 (Tex. App. - Austin, 1987, no writ). Error can also occur if a court exercises its discretion without sufficient facts from which it may make a rational decision. *Id.* Error can occur if the court makes an erroneous choice as a matter of law by: (1) making a choice that was not within the range of choices permitted the court by law; (2) arriving at a choice in violation of an applicable legal rule, principle, or criterion; or (3) by making a choice that was legally unreasonable in the context in which it was made. *Id.* at 775. Such a choice may occur if the trial court fails to consider legally relevant evidence, unreasonably exaggerates a legally relevant factor, or rests its determination on a factor that the court is forbidden by law to consider. *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 939-40 (Tex. App. - Austin 1987, no writ).

The rule governing absence of counsel as a ground for continuance says:

> Except as provided elsewhere in these rules, absence of counsel will *not* be good cause for a continuance or postponement of the cause when called for trial, except it be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge to be state on the record.

Tex. R. Civ. P. 253 (emphasis added). The absence of counsel must not be due to the fault or negligence of the party requesting the continuance. *State v. Crank*, 666 S.W.2d 91, 94 (Tex.), *cert. denied*, 469 U.S. 833 (1984).

We now consider whether the denial of the continuances was an abuse of discretion. In this case, in March 1991, Featherlite's attorney specifically requested that Kellerbrew notify him at the earliest possible moment of any conflicts, given the previous history of conflicts with settings for Featherlite's case. The record shows that as of the date of receipt of the letter notifying Kellerbrew of the Travis County setting, no conflict was disclosed.

After waiting approximately seven months, Killerbrew's counsel requested a continuance of the Featherlite trial. Counsel explains he was trying a case in Orange County that could not be continued.[2] However, what counsel does not explain is what steps, if any, he took between March of 1991 and September 30, 1991, to resolve the conflict before requesting additional continuances in

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2. Appellant's counsel complains that the trial court did not make diligent enough efforts to contact the trial judge in Orange County, apparently to verify that counsel was in trial there. The question, however, was not counsel's whereabouts but why he was in Orange, rather than Travis, County.

Travis County. The docket sheet from Orange County attached to the motion for reinstatement suggests that a continuance was granted in that case on May 30, 1991, with a reset date in July. The next entry shows various actions on September 30, 1991, with no explanation for the resetting from July. The next entry shows various actions on September 30, 1991, with no explanation for the resetting from July. The docket sheet also shows the Orange County case had already been dismissed and reinstated.

The actual or potential availability of another attorney from the same firm has been considered as a factor in denying continuances. The record does not show why another attorney from the firm could not have handled one or the other matter, other than client preference.[3] *See Rabe v. Guaranty Nat'l Ins. Co.*, 787 S.W.2d 575, 579 (Tex. App. - Houston [1st Dist.] 1990, writ denied); *Dover Corp. v. Perez*, 587 S.W.2d 76, 766 (Tex. Civ. App. —Corpus Christi 1979, writ ref'd n.r.e.),*supp. op. on remittitur*, 591 S.W.2d 547 (1979, no writ). Kellebrew relies on *Dancey v. Dagger*, 815 S.W.2d 548 (Tex. 1991) (orig. proceeding) to support the proposition that he had an absolute right to be represented by the particular attorney of his choice from that firm. *Dancey* is distinguishable, however, and does not stand for the proposition cited. In *Dancey*, a hearing was set on temporary orders in Dancy's divorce. After that setting, a criminal case was set. The attorney promptly filed a

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3. Appellant's counsel places great emphasis on an affidavit from his client in which the client stated that he did not want any other attorney, that he did not feel any other lawyer could competently represent his interests, and that his file was large and complicated. The trial court, however, also had before it the pleading in the case, showing that the client was suing based on an injury incurred due to the collapse of the bed of a flatbed truck. The court could have concluded that in its opinion, the case was not complex enough so that another attorney from the firm would not have had adequate time to prepare and handle it.

motion to reset the divorce hearing and the divorce case was reset. The attorney appeared in the criminal case, which was continued to the next day, the day of the divorce setting. There is no indication in the opinion that the resetting of the criminal case was due to any action on the part of Dancy's counsel. The court did not simply dismiss the case for failure to appear, but rather adjudicated on the merits. The trial court violated a local rule regarding conflicts in trial settings. The supreme court held that, under these circumstances, it was an abuse of discretion to try the case. There was no indication in the case that any other attorney was available to represent the client. There is also no indication of the same history of delays.

Given the history of delays and continuances, given that appellee's counsel had requested early notification of conflicts, and given that counsel did little or nothing in advance to avoid the conflict, the court had adequate facts from which it could rationally conclude that absence of appellant's counsel was due to fault. It was not an abuse of discretion to deny the continuance. *Cf. Thrower v. Johnston*, 775 S.W.2d 718 (Tex. App.—Dallas 1989, no writ) (abuse of discretion found when: case set by appellee's counsel attempted to negotiate earlier setting; and all trial court had to do to resolve conflict was to reset case for an afternoon, rather than morning start on the first day of trial).[4] We overrule points of error one and two.

## REINSTATEMENT

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4. Appellant's counsel relies on *Thrower* as support for his position. However, counsel quotes the last part of the opinion, in which the court applies the law to the facts of the case. The facts in *Thrower* are quite different from the facts in this case, rendering *Thrower* distinguishable from counsel's case.

In his third point of error, appellant contends that the trial court erred in denying his motion to reinstate the cause on the trial court's docket. Featherlite contends that the reinstatement provision of Tex. R. Civ. P. 165a(3) does not apply because the cause was not dismissed under 165a for failure to appear but under the court's inherent power to control its docket because of counsel's refusal to proceed. An appellant seeking reversal of a dismissal has the burden of establishing a clear abuse of discretion whether the trial court acted under its express or its inherent authority and whether appellant complains of an order of dismissal or a denial of a motion to reinstate. *Stromberg Carlson Leasing Corp. v. Central Welding Supply Co.*, 750 S.W.2d 862, 864 (Tex. App. —Houston [14th Dist.] 1988, no writ). That is, whether the case is dismissed under the court's inherent power or under Rule 165a, the *standard of review* is abuse of discretion.[5] That a combination of legal principles and factual circumstances might limit the range of choices available to a trial court does not change the standard of review from abuse of discretion. *See Landon*, 724 S.W.2d at 939.

In this case, two continuances were denied. Counsel's failure to appear was thus not the result of accident or mistake.[6] That does not mean that the court, in the exercise

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5. *See* W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 St. Mary's L.J. 883-885 (1990). The author discusses the reinstatement provisions of 165a(3) as being similar to the requisites for granting a new trial in a default judgment. *Id.* at 885. A proper default judgment is reviewed under an abuse of discretion standard. *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939).

6. The order dismissing the case stated that plaintiff refused to proceed with his case and the court found that the case should be dismissed. The order refusing to reinstate the case stated that the motion was denied. There are no findings of fact or conclusions of law in either

of its discretion, would have been prohibited from choosing to reinstate the case, if it found good cause demonstrated, but it did not. As in reviewing points of error one and two, we find no satisfactory explanation of why another attorney in the firm could not have handled one or the other matter; no explanation of why counsel, in view of the letter from Featherlite's counsel, in particular, did not notify Featherlite's counsel earlier; why the Orange County case that conflicted was continued from its July setting (apparently by agreement), especially in view of the fact that the case had already been dismissed and reinstated. The record reveals a pattern of delays and late disclosure of conflicts. Again, we

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order. The judgment must be upheld on any legal theory that finds support in the evidence. *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984).

Counsel quotes from the statement of facts to suggest that Judge Hart refused to find that the failure to appear was intentional or the result of conscious indifference.

> MR. MORGAN: Judge, just for the record, does the Court find that there was not a reasonable explanation for the dismissal or does the Court find there was a conscious indifference or intentional conduct that would result in the Court's ruling.
>
> THE COURT: I do not find that any failure was due to an accident or mistake or that the failure has otherwise been reasonably explained.

The answer to the question perhaps could have been given more directly in terms of the question. However, the judge said that he did *not* find any failure was due to an accident or mistake or had been reasonable explained. The alternatives left under Rule 165a(3) are intentional conduct or conscious indifference. In any event, such an exchange is not a finding or a failure to find as we have no findings of fact or conclusions of law. ***See*** Tex. R. Civ. P. 296.

find no abuse of discretion on the trial court's part. We overrule point of error three.

Kellebrew's motion for rehearing adds points of error four, five, and six, contending that the court used an improper standard of review, violated Rule 90(a) by not discussing the sufficiency of the evidence[7], and violated Kellebrew's due process rights by denying him his choice of attorney. For the reasons discussed in points one, two, and three, we overrule these points.

Having overruled all points of error, we overrule the motion for rehearing and affirm the judgment of the trial court.

_____

Jimmy Carroll, Chief Justice

[Before Chief Justice Carroll, Justices Aboussie and B.A. Smith]

Affirmed

Filed: October 21, 1992

[Do Not Publish]

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7. Texas R. App. P. 90(a) requires the Court's opinion to address every issue raised and necessary to disposing of the appeal. We have discussed the evidence to the degree necessary under an abuse of discretion review.

(2)

Supreme Court, U.S.
FILED
JUL 20 1993
OFFICE OF THE CLERK

No. 92-2054

In The

# Supreme Court of the United States

October Term, 1992

DAVID KELLEBREW,

*Petitioner,*

*vs.*

FEATHERLITE PRECAST CORPORATION,

*Respondent.*

*On Petition for Writ of Certiorari to the Supreme Court of Texas*

## RESPONDENT'S BRIEF IN OPPOSITION

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No. 92-2054

In The

# Supreme Court of the United States

October Term, 1992

DAVID KELLEBREW,

*Petitioner,*

*vs.*

FEATHERLITE PRECAST CORPORATION,

*Respondent.*

*On Petition for Writ of Certiorari to the Supreme Court of Texas*

## RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Featherlite Precast Corporation (hereinafter referred to as "Featherlite"), respectfully prays that David Kellebrew's Petition for Writ of Certiorari to review the opinion of the Third Circuit of Appeals of Texas issued on October 21, 1992 and the refusal of the Supreme Court of Texas to review this case on March 24, 1993, be denied by this Court.

## OVERVIEW

This case involves the state law question of whether a state district court judge has the discretion to dismiss a case before him when a party appears through counsel when his case is called to trial, yet his counsel chooses not to proceed to prosecute his case. This discretion was exercised after Appellant David Kellebrew (hereinafter referred to as "Kellebrew") repeatedly attempted to delay trial through the use of last-minute motions for continuance based upon unannounced conflicts. Featherlite seeks denial of Kellebrew's Petition for Writ of Certiorari for the following reasons:

(i) the alleged "federal questions" were neither timely or properly raised nor expressly passed on;

(ii) No substantial federal question is presented; and

(iii) the Court of Appeals Judgment rests on an adequate, non-federal basis.

## STATEMENT OF THE CASE

This is a personal injury case resulting from an on-the-job accident to Kellebrew on or about November 12, 1985. The date of this accident as well as the procedural history of this case are material to this appeal.

Suit was filed on October 28, 1987, and issue was joined on December 10 of that year against Featherlite Building products. Kellebrew first named the real party in interest, Featherlite Precast Corporation, in his First Amended Petition filed on August 4, 1988. Summary judgment was granted for Featherlite Building Products December 6, 1988, and Kellebrew's claims against that Defendant were severed from the underlying lawsuit (Transcript ["TR."] 96).

Featherlite subsequently filed a Motion for Summary Judgment. Kellebrew requested a continuance which was granted by the Honorable Joseph H. Hart on January 23, 1989 (TR. 96).

**A. First Motion for Continuance**

On or about May 31, 1989, Featherlite set the case for a jury trial for June 11, 1990 (Statement of Facts (S.F.), October 3 hearing, Exhibit 1, pp. 1-3). Thereafter, on May 14, 1990, *twenty-eight days* before trial, Kellebrew filed his Motion for Continuance, alleging that his attorney of record was involved in a complex case in federal court in Beaumont, Texas, and would be unavailable for trial at that time (TR. 15-22). Kellebrew's attorney had made no mention of a prior conflicting commitment to the Travis County Court (TR. 15-22) or to Featherlite (S.F., October 3 hearing, Exhibit 1, p. 12) prior to that time. Nevertheless, Featherlite agreed to the continuance and no Order was entered thereon (S.F., October 3 hearing, Exhibit 1, p. 12).

**B. Second Motion for Continuance**

Eight days after Kellebrew filed his first Motion for Continuance, Featherlite's counsel suggested one of two January jury trial settings available from the Travis County Courts (TR. 30-33). Kellebrew's counsel replied with a request for a March setting (S.F., October 3 hearing, Exhibit 1, p. 14), and in accordance with this request, Featherlite's counsel set the case for jury trial and notified Kellebrew's counsel of the same on June 21, 1990 (S.F., October 3 hearing, Exhibit 1, pp. 15-16). The new trial date was March 4, 1991 and this case was the first case on the docket for that jury trial week (S.F., October 3 hearing, Exhibit 1, pp. 15-16).

Kellebrew, after having taken no action to advise the Travis County Court or Featherlite of a conflicting trial setting (TR. 96), moved for a second trial continuance on February 20, 1991, over eight months after being notified of the agreed setting and only

*twelve days* before the case was scheduled for trial (S.F., October 3 hearing, Exhibit 1, pp. 17-20). On February 28, 1991, The Honorable Paul Davis, sitting as Judge of the 147th District Court, denied Appellant's Motion for Continuance with the following docket notation:

> Plaintiff's Motion for Continuance Denied. Plaintiff's attorney has conflict of case set in Beaumont. This case set No. 1 by agreement since June, 1990. Beaumont case not set 'till December 1990. Both cases set for trial (jury) on 3/4/91. Plaintiff failed to bring conflict to attorney of Beaumont or Austin Courts for resolution until Motion for Continuance filed 2/21/91. Motion denied. P.D.

(TR. 96). An Order denying the Motion was signed by Judge Davis on March 1, 1991, duplicating the language of this docket notation (S.F., October 3, Exhibit 1, pp. 21-22). Trial was commenced in the subject case, but that trial resulted in a mistrial.

**C. Third Motion for Continuance**

On the day of the mistrial, Kellebrew's counsel was advised of Featherlite's intentions to set the case for trial on either October 7 or 21, 1991, and invited to agree or disagree with the setting (S.F., October 3, Exhibit 1, pp. 31-32). On March 13, Kellebrew's counsel agreed to such setting "subject to other trial settings" (S.F., October 3, Exhibit 1, p. 30). This reply was followed by a certified letter the next day from Featherlite's counsel inquiring about "other trial settings" and notifying Kellebrew's counsel that:

> If you attempt to obtain a continuance for this trial setting, I will let the Court know that you

> did not inform us of any previous settings for that date when notified of the setting.

(S.F., October 3, Exhibit 1, pp. 23-25).

Again, without notifying the courts or opposing counsel of a conflicting setting (TR. 96; S.F. 9, October 3 hearing), and after having knowledge of the Travis County setting for over seven months, Kellebrew filed his Third Motion for Continuance on September 30, *seven days* before trial (TR. 35-38). On October 3, Judge John K. Dietz heard Kellebrew's Motion. Kellebrew's counsel stated in that hearing, which took place four days after the Orange County case had begun, that the trial in Orange County was "going to last for another two weeks, or at least another week." (S.F., October 3, Exhibit 2). The court asked Kellebrew's counsel when the Orange County case was set on the docket, when Kellebrew's counsel first found out it was going to trial, whether a Motion for Continuance had been filed in that case, and whether the Orange County Court was advised of the conflict with the Austin case, but received no response (S.F., p. 11). The court admitted into evidence the correspondence referenced above (S.F., p. 10) and denied the Motion for Continuance. An Order was signed denying the continuance on that same date (TR. 40).

**D. Fourth Motion for Continuance**

With the knowledge that his Motion for Continuance had been denied, Kellebrew appeared in Travis County on the day his case was called to trial through the same attorney who argued his Motion for Continuance, a member of the firm of Reaud, Morgan & Quinn, the firm acting as attorney of record for Kellebrew in this case. He was accompanied by a local attorney and again requested a continuance. This time appearing before the Honorable Judge Joe Hart sitting as the Judge of the 147th Judicial District Court, these attorneys presented Kellebrew's position in favor of a Motion for

Continuance. Kellebrew continued to skirt the issue of why the courts and opposing counsel were not informed of the conflict in trial settings when it arose. None of the questions asked by the Honorable John K. Dietz were answered by Kellebrew in this second hearing. No information was provided showing that no other member of his firm, including himself, was available to try the case. He mentioned only that Kellebrew desired to have Glen Morgan represent him as his attorney at trial.

Kellebrew's Motion for Continuance was denied by the Honorable Joe Hart following argument by Featherlite's counsel. An Order denying the Motion for Continuance was signed on October 7, 1991 (TR. 45-46). After denying the Motion for Continuance, the case was called for trial. With two attorneys present and acting on his behalf, Kellebrew announced in open court that he would not proceed to select a jury that afternoon (S.F. 17, October 7 hearing). The court then ordered dismissal of Kellebrew's case (S.F. 17, October 7 hearing; TR. 48-49).

**E. Motion to Reinstate**

Kellebrew's Motion to Reinstate was heard on November 13, 1991. No new evidence or agruments were proffered by Kellebrew's counsel, which now included Glen Morgan as well as Richard Clarkson and Guy C. Fischer. Even with Mr. Morgan present, no explanation was given for Kellebrew's failure to appear except to reiterate that his attorney was in trial. None of the lingering questions were answered. Although Kellebrew's counsel stated that he wanted his case tried, his actions and omissions ran counter to that proposition. The court, based on the facts before it and those not presented by Kellebrew, denied the Motion to Reinstate (TR. 86).

## REASONS FOR DENYING THE WRIT

### I.

### KELLEBREW FAILED TO TIMELY RAISE THE POINTS OF ERROR UPON WHICH HE APPEALS TO THIS COURT.

This Court should deny Kellebrew's Petition for Writ of Certiorari because "the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on. . . ." Sup. Ct. R. 16(b), 28 U.S.C.A. §§ 30-31 (1984).

The issues Kellebrew raises in his Petition were not expressly passed on by the courts below. Moreover, he did not raise the constitutional points of error until his Motion for Rehearing to the Court of Appeals (*see* Appendix F, p. 94a, Petition for Certiorari).

A party must present a point of error concerning the matter complained of in his initial brief to the Court of Appeals; a motion for rehearing is too late. *Watson v. Glens Falls Ins. Co.*, 505 S.W. 2d 793, 797-98 (Tex. 1974); *Lone Star Gas Co. v. Sheaner*, 305 S.W. 2d 150, 153 (Tex. 1957); *Gillen v. Diadrill, Inc.*, 624 S.W. 2d 259, 264 (Tex. App. — Corpus Christi 1981, writ dism'd); *see* Tex. R. Civ. P. 74(d). Yet, Kellebrew failed to raise his alleged federal question (the two questions presented for review in Kellebrew's Petition to this Court both concern the constitutional due process right) until Appellant's Motion for Rehearing in the Court of Appeals. Therefore, Kellebrew did not timely press his due process argument in the lower courts, his argument was not passed upon by the trial or appellate court, and it is foreclosed.

## II.

## KELLEBREW RAISES NO SUBSTANTIAL FEDERAL QUESTION AND THE COURT OF APPEALS JUDGMENT RESTS ON AN ADEQUATE, NON-FEDERAL BASIS.

A. Kellebrew's failure to comply with Texas procedure by untimely asserting his points of error renders the Court of Appeals' Judgment sustainable on an adequate non-federal basis. *See* Sup. Ct. R. 16(b), 28 U.S.C.A. §§ 30-31 (1984).

B. In the alternative, although claiming he was denied counsel, this case is more appropriately characterized as a refusal on the part of Kellebrew to prosecute his case when an attorney was available to try the case for him. The general rule in Texas is that absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial. Rule 253, T.R.C.P. Therefore, it is not an abuse of discretion for the trial court to refuse to continue a case when an attorney is available to try the case for the party seeking the continuance. By his very presence at trial when called, Richard Clarkson of the law firm of Reaud, Morgan & Quinn represented the interests of Kellebrew before the Travis County courts and proved his availability to try the case.

While the Motion for Continuance showed that Glen Morgan would not be available for trial on October 7, 1991, it did not show that no member of the firm of Reaud, Morgan & Quinn, Inc. was available for trial. Conflicting settings for other lawyers in the firm was not raised in Petitioner's Motion for Continuance, and cannot be made the basis for a continuance. The absence of evidence showing why another of the members of the firm of Reaud, Morgan & Quinn could not be available to try the case lends further support for the exercise of discretion by Judges Dietz and Hart. In addition, there was no showing that Alto Watson, co-counsel with Glen Morgan in this case, could not try the Travis County case while Mr.

Morgan completed the trial in Orange County. There was nothing to indicate the necessity of two attorneys in either trial.

Even though the complicated nature of a case would not be grounds upon which to grant a Motion for Continuance, there is no showing that this personal injury lawsuit is too complicated to have another attorney try the case. The trial court could conclude from the pleadings that the case was not complex enough to prevent another attorney from having adequate time to prepare and handle the trial, especially given the months that Petitioner's counsel must have been aware of the conflict. The evidence shows that this case was prepared for trial once before by Petitioner's attorney, making it easier for another member of his firm to try the case in his absence. At the reinstatement hearing, Glen Morgan admitted that Petitioner's case was ready for trial (S.F. 9, November 13 hearing).

A litigant is not necessarily entitled to have a specific attorney out of a firm represent him. In *Lumberman's Mutual Casualty Co. v. Watson*, 618 S.W. 2d 883 (Tex. Civ. App. — Ft. Worth 1981, no writ), appellant's trial counsel moved for a continuance because he was "under a federal discovery order" and therefore unavailable for trial. The Court of Civil Appeals held that overruling this motion did not constitute an abuse of discretion, since another attorney was available for trial. This was true even though the attorney who tried the case was newly licensed, had never tried a district court case, and had never tried a worker's compensation case.

In *Rabe v. Guaranty National Ins. Co.*, 787 S.W. 2d 575 (Tex. App. — Houston [1st Dist.] 1990, no writ), appellant's attorney was in trial in another county on the day appellee's motion for summary judgment was set for hearing and granted in the absence of appellant's counsel. The day before the hearing, appellant filed a motion for continuance, which was overruled. The Court of Appeals found no abuse of discretion when the attorney's firm

failed to show why another attorney from the firm could not have represented the appellant at the hearing. *Rabe*, 787 S.W. 2d at 579.

This Court has not recognized a constitutional right to counsel in a civil case. *Kentucky W. Va. Gas Co. v. Pennsylvania Public Utility Comm'n*, 837 F.2d 600, 618 (3rd Cir.), *cert. denied*, 488 U.S. 941, 109 S. Ct. 365, 102 L. Ed. 2d 355 (1980). Yet, if such right exists, then as stated by the Fifth Circuit in *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1263 (5th Cir. 1983), cited by Kellebrew, the right to counsel cannot be exercised without thought as to the needs of effective administration of justice. The ultimate decision on delaying the trial must remain with the trial judge; otherwise, unscrupulous attorneys might abuse their authority, presumably for purposes of delay or obstruction of the orderly conduct of the trial. The State has an obvious interest in avoiding such abuses.

The Seventh Circuit, in *United States ex rel. v. Spurlark*, 683 F.2d 216, 220 (7th Cir. 1982), stated that "a party's right to be represented by the attorney of his choice cannot be insisted upon to such a degree that it obstructs the reasonable and orderly procedures of the Court." This reality was acknowledged by this Court when it recognized the necessity of granting a trial judge a great deal of latitude in scheduling trials. As stated in *Morris v. Slappy*, 461 U.S. 1, 11, 103 S. Ct. 1610, 1616, 75 L. Ed. 2d 610 (1983),

> [n]ot the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness

in the face of a justifiable request for delay" violates the right to the assistance of counsel.

Kellebrew has failed to show any compelling reasons why the broad discretion granted by this Court to the trial court should be restricted in this case. The circumstances of this case, as set forth in Featherlite's Statement of the Case, show that absence of counsel was due to Kellebrew's own fault, negligence, or intentional actions. Kellebrew chooses to ignore this basis for the trial court's exercise of its discretion by continually omitting from its Briefs (a total of seven to this point) any discussion of his actions or omissions. However, there is much to support the court's decision. In the present case, it was not a surprise to Glen Morgan that a case which his partner claimed would last two to three weeks would conflict with the Travis County setting. In fact, he should have been very aware of the problems with conflicting settings because of: (1) his history with prior conflicts; and (2) his receipt of correspondence from opposing counsel about the need to notify him of any conflicts.

Kellebrew's attorney was under a duty to advise both courts and opposing counsel of the possibility of a conflict as soon as that possibility became apparent. In fact, Rule 7 of the Rules of Administration of the Third Administrative Judicial Region of Texas, cited by Kellebrew on pages 8 and 9 of the Petition for Writ of Certiorari, makes it a "duty" of Kellebrew's attorney to call the affected judge's attention to all dual settings as soon as they are known. If counsel for Kellebrew would have satisfied his duty of notifying the affected courts of the obvious conflict that he had known about for months, then the priorities set forth in Rule 7(b)(3) should have led to this case being tried on the date in question, instead of the Orange County case, as it was the "earliest set case" and the "earliest filed case." *See* Rule 7(b)(3), Rules of Administration for the Third Administrative Judicial Region of Texas. Additionally, it logically follows that Rule 7(a), concerning

conflicting settings, applies only when the attorney fulfills his initial obligation to notify the affected judges of the dual setting as soon as it is known.

Featherlite's attorney specifically requested notification of any conflict at the time the case was originally set. Had Kellebrew's attorney done so, steps might have been taken to resolve the conflict and try both cases without any problem. However, the record is silent as to any effort by Kellebrew's counsel to take any action to resolve the potential conflict. The record fails to reflect whether Kellebrew's counsel advised the Orange County Court of the setting, moved for a continuance in that case before trial, or took any other action to resolve this matter prior to a week before the Travis County case was scheduled for trial. In the absence of this information, the assumption on appeal is that the omitted facts support the propriety of the court's order. *DeBell v. Texas General Realty, Inc.*, 609 S.W. 2d 892 (Tex. Civ. App. — Houston [14th Dist.] 1980, no writ).

A strong basis for the trial court's dismissal of Kellebrew's case can be found in the Texas Supreme Court's opinion in *Southern Pacific Transportation Co. v. Stoot*, 530 S.W. 2d 930, 931 (Tex. 1975). In *Stoot*, the Texas Supreme Court stated in strong language that delay cannot be tolerated in this day of crowded dockets.

> Delay haunts the administration of justice. It postpones the rectification of wrong and the vindication of the unjustly accused. It crowds the dockets of the courts, increasing the costs for all litigants, pressuring judges to take short cuts, interfering with the prompt and deliberate disposition of those causes in which all parties are diligent and prepared for trial, and overhanging the entire process with the pall of

> disorganization and insolubility. But even these are not the worse of what delay does. The most erratic gear in the justice machinery is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination. If the facts are not fully and accurately determined, then the wisest judge cannot distinguish between merit and demerit. If we do not get the facts right, there is little chance for the judgment to be right.

Featherlite directs this Court's attention to the year in which the accident made the basis of this suit occurred (1985) and the year the case was dismissed after repeated delay by Kellebrew's counsel (1991).

## CONCLUSION

There are a number of grounds to support the trial court's actions on the two Motions for Continuance and Motion to Reinstate. The trial court properly exercised discretion when entering the Order of Dismissal, for which no appeal has resulted therefrom.

This is not a case of a trial court judge refusing to be flexible with a party who was placed in a position not of his own making. To the contrary, the record reveals a pattern of delays and late disclosure of conflicts through the intentional acts or conscious indifference of Kelebrew's counsel to the rules of the courts of the State of Texas and the proper administration of their dockets. Kellebrew has never claimed that this counsel notified the courts and opposing counsel of a conflict in trial settings as he is obligated to do. Kellebrew has never explained why no notice was given when the conflict would have been obvious on his attorney's

calendar. Kellebrew's counsel did nothing in advance to avoid the conflict. In short, Kellebrew never provided the trial court with a reason to decide in his favor.

WHEREFORE, PREMISES CONSIDERED, Respondent, Featherlite Precast Corporation, prays that this Court deny Petitioner's Petition for Writ of Certiorari, or alternatively, if the Court decides to grant the Petition, that the Court affirm the judgment of the lower court.

Respectfully submitted,

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